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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

6 20 CR 330 (AJN)

7 GHISLAINE MAXWELL,

8 Defendant.

9 -----x
10 New York, N.Y.
11 November 1, 2021
12 11:05 a.m.

13 Before:

14 HON. ALISON J. NATHAN,

15 District Judge

16 APPEARANCES

17 DAMIAN WILLIAMS
18 United States Attorney for the
19 Southern District of New York

20 ALISON MOE
21 MAURENE COMEY
22 ANDREW ROHRBACH
23 LARA POMERANTZ
24 Assistant United States Attorney

25 COHEN & GRESSER
26 Attorneys for Defendant
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29 Attorneys for Defendant
30 JEFFREY PAGLIUCA
31 LAURA MENNINGER

32 BOBBI C. STERNHEIM
33 Attorney for Defendant

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1 (Case called)

2 DEPUTY CLERK: Counsel, please state your name for the
3 record, starting with the government.

4 MS. MOE: Good morning, your Honor, Alison Moe for the
5 government, joined at counsel table by Lara Pomerantz, Maurene
6 Comey, Andrew Rohrbach and Sunny Drescher, a paralegal
7 specialist in our office.

8 THE COURT: Good morning.

9 MS. STERNHEIM: Good morning, Judge Nathan, Bobby C.
10 Sternheim appearing for Ghislaine Maxwell. Next to me at
11 counsel table also present are part of the defense team,
12 Jeffrey Pagliuca, Laura Menninger and Christian Everdell.

13 THE COURT: Good morning, everyone.

14 Good morning, Ms. Maxwell. Please be seated.

15 I am told, consistent with the protocols, that I can
16 remove my mask while seated here at the bench, and counsel,
17 when they're at the podium, if you wish to speak from the
18 podium, you may remove your mask. So I will do that.

19 We're here today for a pretrial conference in this
20 matter. Trial is scheduled to commence with the jury
21 questionnaire process beginning this Thursday, November 4. As
22 I have indicated, we will begin trial on November 29.

23 As I see it, the primary purpose of today's conference
24 is largely to address the parties' motions in limine and then
25 discuss some additional logistical issues.

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1 Counsel, I'm prepared to turn to the motions first,
2 unless there's any reason to deviate from that.

3 Ms. Moe?

4 MS. MOE: No, your Honor, thank you.

5 THE COURT: Ms. Sternheim?

6 MS. STERNHEIM: Not at this time, Judge.

7 THE COURT: All right. I am in receipt of the
8 parties' various motions in limine, responses in opposition,
9 and replies in support. I did require the parties to file the
10 papers on the public docket with their proposed redactions so
11 that the public could have immediate access to the documents.

12 I'll rule on the proposed redactions as quickly as I
13 can, including some that I will discuss today, but we will use
14 the same process going forward so as not to delay public access
15 to the bulk of materials related to pretrial filings. And I
16 thank counsel for that, as well as the submission to me of the
17 unredacted versions with the color coding indicating requested
18 redactions.

19 The government filed 11 motions in limine and the
20 defense 13, so there's a lot of ground to cover. I am prepared
21 to discuss all the motions now with the exception of the
22 *Daubert* motion. As I indicated in an order that was docketed
23 this morning, I will hold a *Daubert* hearing before resolving
24 that motion.

25 As to the rest, some I want to hear further from the

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1 parties on issues, some I'm prepared to resolve without further
2 discussion. For all of them, to the extent I can resolve them
3 or give guidance today, I will. In some cases, by necessity, I
4 will reserve.

5 Of course, as with all in limine motions, those are
6 preliminary rulings based on what I know now about the
7 anticipated evidence and arguments. My preliminary rulings are
8 to guide the parties in advance of trial, to guide opening
9 statements and the like. Facts on the ground, of course, can
10 change during trial and you must reraise issues if you think
11 the other side has opened the door or that premises of certain
12 pretrial holdings no longer hold.

13 With that, I'm going to move slightly out of order and
14 begin with the defendant's 12th motion in limine because it
15 involves terminology questions that apply throughout. After
16 that motion I will address the government's motions in order
17 and then address the remaining defense motions in order.

18 In the defendant's 12th motion in limine, the defense
19 asked the Court to preclude use of the terms "victim" and
20 "minor victim." The motion is denied. Government counsel can
21 use the word "victim" if they're referring to someone alleged
22 to be a victim of the crimes charged in the indictment, and
23 they may use the word "minor" to describe individuals that
24 were, at the relevant time period, under the age of consent.

25 As my colleague, Judge Furman, has explained,

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1 precluding the term "victim" is both unnecessary and
2 impractical. *United States v. Dupigny*, 18 CR 528, transcript
3 of October 17, 2019, Docket No. 198 at 50. It is appropriate
4 for the government to use the terms as representative of its
5 litigating position. If the government does this in any way
6 that is atypical or unduly prejudicial, I will revisit.

7 Defense only cites out-of-circuit or state court
8 decisions for the proposition that those terms are inherently
9 prejudicial and harm the presumption of innocence. Numerous
10 courts of appeal disagree with that argument, particularly when
11 the presentation of evidence and the court's instructions
12 "taken as a whole clarify the government's burden of proving
13 all elements of the crime." *United States v. Washburn*, 444
14 F.3d, 1007, 1113 (8th Cir. 2006); *see also, Server v. Mizell*,
15 902 F.2d 611, 615, (7th Cir. 1990); *United States v. Granbois*,
16 119 F.App'x 35, 38-39 (9th Cir. 2004).

17 Defendant's lone district court opinion does not tip
18 the balance of this authority. I will, of course, instruct the
19 jury repeatedly that the defendant is presumed innocent and
20 that it is the government's burden and the government's burden
21 alone to prove guilt beyond a reasonable doubt. Those
22 instructions will eliminate any potential prejudice. See again
23 Judge Furman's decision in *Dupigny*, Docket No. 198 at 49

24 That matter resolved, I will turn to the government's
25 first motion. This goes to pseudonyms. The government moves

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1 pursuant to the Crime Victims Rights Act, 18 USC Section 3771,
2 to permit certain witnesses and certain non-testifying
3 witnesses to be referred to by pseudonyms. And there is also
4 the issue of redacting related exhibits that contain the names
5 or specifically identifying information. Specifically, the
6 government requests that eight individuals be referred to by
7 pseudonyms or their first name.

8 The defense is already aware of the identities of all
9 of these individuals, and as the government proposes it, the
10 jury will also be aware of the individuals' real identities.
11 The request only implicates how those individuals are referred
12 to in open court.

13 This is well-tread territory, and I will grant the
14 request for the following reasons:

15 The burden to justify this type of request, of course,
16 starts with the government. It "must provide a reason for the
17 limitation." *United States v. Marcus*, which is 2007 WL 330388
18 at *1, an Eastern District decision citing *United States v.*
19 *Marti*, 421 F.2d 1283 (2d Cir. 1970).

20 I agree with the government that limiting disclosure
21 here would protect the alleged victims from potential
22 harassment from the media and others, undue embarrassment and
23 other adverse consequences. The Court has an obligation under
24 the Crime Victims Rights Act to take certain measures at trial
25 to protect the dignity and privacy of alleged victims. 18 USC

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1 Section 3771(a)(8).

2 It is quite common for alleged victims, both in cases
3 that have garnered media attention and those involving
4 allegations of sex abuse, to testify or be referred to by
5 pseudonyms or first names. Courts have allowed this whether or
6 not the alleged victims are minors or adults or adults
7 testifying about abuse that allegedly occurred when they were
8 minors.

9 Let me give a bit of a string cite here. See, for
10 example, *United States v. Kelly*, No. 19 CR 286, which is a high
11 publicity trial involving adults testifying about sex abuse as
12 minors, and that's in the Eastern District of New York; *United*
13 *States v. Raniere*, No. 18 CR 204, a high-publicity trial
14 involving at least one adult testifying about sex abuse as
15 minor; *United States v. Dupigny*, No. 18 CR 528, involving sex
16 trafficking, *United States v. Kelly*, No. 7 CR 374, and that
17 could be found at 2008 WL 5068820, which is an Eastern District
18 case involving an adult testifying about sex abuse as a minor;
19 *United States v. Graham*, No. 14 CR 500, found at 2015 WL
20 6161292 (S.D.N.Y., October 2015), that involved adults
21 testifying about sex trafficking as minors; *United States v.*
22 *Gardner*, No. 16 CR 20135, found at 2016 WL 5404207, an Eastern
23 District case from 2016 involving adults and adults testifying
24 about sex abuse as a minor, and collecting similar cases.

25 The practice has been widely permitted because

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1 requiring alleged victims to publicly provide their names could
2 chill their willingness to testify for fear of having their
3 personal histories publicized. *Raniere*, Docket No. 622 at 32.

4 Given the sensitive and inflammatory nature of the
5 conduct alleged, such publicity may cause further harassment or
6 embarrassment, and other alleged victims of sex crimes may be
7 deterred from coming forward. See, *Martinez*, 17 CR 281,
8 (E.D.N.Y. 2017), Docket No. 34.

9 Limiting the disclosure of alleged victims' identities
10 in this case furthers these important interests. The same is
11 true with the identities of certain witnesses, although not
12 alleged victims themselves, because the disclosure of their
13 identities would necessarily reveal the identities of the
14 alleged victims.

15 I'm not persuaded by defense counsel's arguments to
16 the contrary. First, the defense notes that Ms. Maxwell does
17 not pose a threat to any of the witnesses. That is plainly
18 true, and the government does not argue or suggest or allege
19 otherwise, but just because that reason for limiting
20 disclosures is absent in this case does not eliminate the
21 possibility of other justifications. And again, there is a
22 need here to prevent undue embarrassment, harassment from the
23 press and third parties, and any resistance of others to come
24 forward and report alleged abuse. Cases establish that this is
25 sufficient

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1 Moreover, any potential prejudice in this regard can
2 be cured with an appropriate instruction explaining that the
3 reason for the precaution is regard for the witnesses' and
4 alleged victims' privacy, and that no inference can or should
5 be drawn against the defendant because of these precautions

6 My colleagues in this district and elsewhere have used
7 such an instruction in similar cases. The defense's concern
8 that this sort of instruction affords "Court-sanctioned
9 sympathy and credibility" is unfounded. My instructions on the
10 law will clearly and repeatedly instruct the jury on the
11 presumption of innocence and their sole role in assessing
12 witness credibility

13 Nor am I persuaded by the defense's arguments that the
14 fact that some alleged victims have previously publicly
15 disclosed some of their allegations obviates the need to limit
16 disclosure. As another district court has held, "just because
17 some victims' names are publicly available does not mean that
18 the details of their experience are already available."

19 *Raniere*, Docket No. 662 at 34, n. 17

20 As I acknowledged in my protective order for this
21 case, "Not all accusations and public statements are equal.
22 Deciding to participate in or contribute to a criminal
23 investigation or prosecution is a far different matter than
24 simply making a public statement relating to Ms. Maxwell or
25 Jeffrey Epstein." Docket No. 37 in this case at 2.

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1 The government anticipates that the alleged victims
2 will "testify in explicit detail and/or be the subject of
3 highly sensitive and personal testimony concerning illegal
4 sexual abuse. Thus, there's good reasons to limit public
5 disclosure of their names and specifically identifying
6 information during trial in this highly publicized case
7 involving highly sensitive issues."

8 Since there is a valid reason to limit disclosure in
9 this case, the defense must proffer a particularized need for
10 the disclosure of the relevant information, which is weighed
11 against the risks to the witnesses. I'll cite here, for
12 example, *United States v. Marcus*, again citing the Second
13 Circuit case in *United States v. Marti*.

14 As both parties acknowledge, the government's request
15 potentially implicates the defendant's right under the Sixth
16 Amendment's confrontation clause which guarantees defendants
17 the right to cross-examine adverse witnesses. The Second
18 Circuit has identified two central interests defendants have in
19 the public airing of identifying information about witnesses.
20 Again referencing the *Marti* case, 421 F.2d 1263.

21 The first is not relevant here because, as I have
22 noted, the defense is aware of the alleged victims' and
23 witnesses' identities.

24 The defendant argues that the second interest,
25 however, is implicated. Namely, defense may need the witness

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1 to reveal identifying information because knowledge of that
2 information by the jury might be important to its deliberations
3 as to the witness's credibility or knowledgability. That's
4 quoting the *Marti* case again. In particular, the defense
5 argues that revealing the alleged victims' and witnesses'
6 identities is necessary to probe the nature of the alleged
7 victims' occupations as relevant to the credibility and elicit
8 certain impeachment evidence.

9 I agree that such cross-examination cannot be unduly
10 limited and the government concedes the same. The government's
11 motions in limine 15, n. 6; government reply at 17 to 18. And
12 I will ensure that it is not.

13 My decision today grants the government's request to
14 limit the public disclosure of the alleged victims and some
15 witnesses' names and other specifically identifying
16 information, such as the specific names of current and past
17 employers, names of family members and addresses.

18 Limiting disclosure of the specifically identifying
19 information does not limit the anticipated cross-examination
20 that the defense described in its papers. All lines of inquiry
21 the defense outlined in its response are available without
22 disclosing specific names of employers or other specifically
23 identifying information. For example, the defense can probe
24 the genre, nature, and trajectories of witnesses' careers
25 without eliciting the specific employer name, but the defense's

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1 cross-examination should not include specifically identifying
2 information, and counsel must act responsibly doing so. If,
3 after good faith effort in that regard is made and the defense
4 at some point feels they have hit a wall and can articulate a
5 specific need with respect to a particular line of questioning,
6 they can reraise the issue with opposing counsel and with me.

7 So that's my ruling on that motion. That said, I do
8 strongly encourage the government to speak candidly with the
9 anticipated witnesses so that they're clear eyed about what
10 this process will entail, the fact that cross-examination will
11 not be curtailed beyond the specific identifying information
12 that form the basis of the government's request, and the
13 possibility that despite these measures their identities may
14 become known and revealed to the public.

15 Should any of those witnesses or the government choose
16 not to proceed by pseudonym, the government shall let defense
17 counsel and the Court know. In the meantime, the government
18 and defense counsel shall confer about names that will be used
19 and any additional process for facilitating the clear
20 presentation of evidence. The Court will adopt a clear and
21 straightforward approach and the parties are admonished to come
22 to agreement on the use of pseudonyms and/or first names.

23 First assignment, there will be others, by November 10
24 the parties shall submit a joint letter to the Court under seal
25 explaining the nomenclature that they propose be employed with

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1 respect to the actual identity of each witness.

2 As I mentioned, I do agree with the government that a
3 limiting instruction explaining the reasons for the precautions
4 is appropriate. In light of my ruling, I expect the parties to
5 confer and jointly propose such a limiting instruction.

6 Homework No. 2. This shall also be filed jointly by
7 November 10, and that can be filed on ECF.

8 There are some logistics of voir dire related to this.
9 Some of my colleagues have used the list method that the
10 government proposes on page 15, footnote 5 of their motion, and
11 I agree that this proposal makes sense. Once again, the
12 parties shall confer and submit on ECF by November 10 a joint
13 proposal for any logistical issues related to this for voir
14 dire.

15 That leaves the issue of sealing unredacted exhibits
16 and the limited redacting of exhibits containing specific
17 personal identifying information. The government shall manage
18 the logistics of this process throughout trial. So think
19 through and include in your November 10 submission on ECF the
20 specifics of this part of the process so that the trial
21 exhibits can be contemporaneously marked with the appropriate
22 limited redactions, and the government will need to manage this
23 on an ongoing basis throughout trial.

24 Government's motion 2, the alleged victims' prior
25 consistent statements. So this goes to the admissibility of

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1 any alleged victims' prior consistent statements. As I can
2 tell from the cross papers here, I don't think there's an issue
3 to resolve now. The government's reply notes it's not seeking
4 to admit any particular prior consistent statements at this
5 time.

6 Ms. Moe, let me confirm there will be no mention of
7 any such statements in the government's openings, is that
8 correct?

9 MS. MOE: That's correct, your Honor.

10 THE COURT: Okay. Of course, the admissibility of any
11 prior consistent statement hinges on defense counsel's
12 arguments and the purpose for which any statements are being
13 offered.

14 I think the parties agree on the applicable law here.
15 If this does become an issue, as they have outlined in their
16 papers, Rule 801(d)(1)(B)(i) excludes from the rule against
17 hearsay a witness's prior consistent statement offered to rebut
18 the charge of recent fabrication or improper influence or
19 motive. Of course, the prior consistent statement, should the
20 government seek to have any admitted, must have been made
21 before the motive to fabricate that's alleged arose, or else it
22 has no relevance in rebutting the fabrication charge. *Tome v.*
23 *U.S.*, 513 U.S. 150, (1995).

24 The rule's second subsection excludes prior consistent
25 statements from the rule against hearsay when they're offered

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1 to rehabilitate a witness attacked on another ground. It's
2 801(d)(1)(B)(ii). For example, the statement could be admitted
3 to explain what would otherwise appear to be an inconsistency
4 in the witness's statement and rebut a charge of faulty memory.
5 *United States v. Purcell*, 967 F.3d 159, (2d Cir. 2020).

6 If it becomes relevant, the government may offer prior
7 statements before the witness testifies if the defense attacks
8 the credibility in opening statements and it's clear that the
9 witness will be subject to cross-examination. *United States v.*
10 *Flores*, 945 F.3d 687, (2d Cir. 2019). That's restating the
11 applicable law here that the parties appear to agree to in the
12 briefs. The government doesn't anticipate any such effort to
13 offer such statements at this time and won't mention any in
14 opening beyond that.

15 Is there anything specific to flag or discuss here,
16 from the government's perspective?

17 MS. MOE: No, your Honor, thank you.

18 THE COURT: Ms. Sternheim?

19 MS. MENNINGER: Your Honor, Laura Menninger. None for
20 the defense at this time. Thank you.

21 THE COURT: All right. Thank you.

22 The government's 3 and 4, which I'm going to group,
23 the government seeks to preclude evidence and arguments by the
24 defense, (1) about the investigation in Florida, including the
25 non-prosecution agreement, (2) that Ms. Maxwell was not charged

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1 by the U.S. Attorney's Office in the Southern District of
2 Florida, (3) about the scope and timeline of investigation in
3 New York, and (4) other evidence that demonstrates the
4 government's motives for investigating Ms. Maxwell.

5 The Court's analysis here is guided by four principles
6 set by the Second Circuit and the Supreme Court.

7 First, because the government has no duty to employ,
8 in the course of a single investigation, any particular
9 investigative technique, the failure to utilize some particular
10 technique does not tend to show that a defendant is not guilty
11 of the crime of which he's been charged and is therefore
12 irrelevant. *United States v. Saldarriaga*, 204 F.3d 50, (2d
13 Cir. 2000). That's the first legal principle that frames the
14 discussion here.

15 Second, arguments that the government had an improper
16 motive generally must be directed to the Court rather than the
17 jury. *United States v. Regan*, 103 F.3d 1072, (2d Cir. 1997);
18 see also, *United States v. Farhane*, 634 F.3d 127 (2d Cir.
19 2011).

20 Third legal principle: There is no per se bar on
21 admitting evidence of the government's charging decisions.
22 Rather, the Court must -- I will quote here -- "inquire into
23 its relevance and probative value to the respective case."
24 *United States v. White*, 692 F.3d 235 (2d Cir. 2012); see also,
25 *United States v. Ngono*, 801 F.App'x. 19 (2d Cir. 2020).

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1 Fourth, the confrontation clause of the Sixth
2 Amendment guarantees a criminal defendant the right to
3 meaningful cross-examination of government witnesses at trial.

4 *United States v. Figueroa*, 548 F.3d 222, (2d Cir. 2008).

5 Indeed, cross-examination is the principal means by which the
6 believability of a witness and the truth of his testimony are
7 tested. *Davis v. Alaska*, 415 U.S. 308, 316, (1974).

8 With this legal framework in mind, and in light of the
9 parties' extensive briefing on these issues, I think the
10 admissibility of some of the proposed evidence can be
11 determined now, but the admissibility of other evidence will
12 require additional facts and the context of trial to decide,
13 but I think it's important for me to give guidance.

14 Based on the papers before me, I provide the following
15 guidance: First, the Court will preclude affirmative evidence
16 by the defense that goes to the thoroughness of the
17 investigation. Although evidence that goes to the thoroughness
18 of the government's investigation can in some cases be relevant
19 and may in some cases be admissible, it's not relevant or
20 admissible if not probative of the defendant's guilt of the
21 crimes charged.

22 In its briefing, the defense relies heavily on *Kyles*
23 *v. Whitley*, 514 U.S. 4 (1995), in which the Supreme Court held
24 that an informant's statements to police were material for
25 purposes of *Brady* disclosures because the statements could be

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1 used to "attack the thoroughness and even the good faith of the
2 investigation."

3 That holding has only limited relevance here. First,
4 the statement at issue in *Kyles* was probative because it
5 suggested the defendant's innocence, not because it was
6 evidence of the reasons for the charging decision or the
7 investigation's timeline.

8 Second, the Second Circuit in *Watson v. Greene*
9 narrowly construed the holding in *Kyles* by clarifying that it
10 "addresses only the prosecution's obligations to disclose *Brady*
11 material" and "provides no guidance about what evidence must be
12 admitted at trial or what lines of questioning must be
13 permitted to ensure a meaningful opportunity to cross-examine
14 adverse witnesses." *Watson v. Greene*, 640 F.3d 501, 512, n. 11
15 (2d Cir. 2011).

16 Now the Second Circuit's decision in *Watson* does,
17 however, suggest that some arguments about the thoroughness of
18 the investigation are probative of guilt in some circumstances.
19 In that case, law enforcement had received a tip that the
20 defendant was innocent because another individual shot the
21 victim. The Second Circuit stated that cross-examination of
22 the lead investigating officer on that tip was probative
23 because the jury could conclude that law enforcement had
24 prematurely concluded the defendant was the shooter and it
25 failed to investigate diligently the possibility that it was

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1 the other individual. *Watson*, 640 F.3d, 511-12.

2 Other courts in this Circuit have described challenges
3 to the thoroughness of the investigation as a "common method of
4 undermining a prosecution" by, for example, cross-examining
5 officers on which leads they followed and which they did not.

6 See, for example, *Gray v. Ercole* -- I don't have that full
7 quote -- 2011 WL 5082868 (E.D.N.Y 2008). Or defense counsel
8 may, on cross, examine investigating officers if they

9 considered alternative suspects. *United States v. Birbal*, 92

10 CR 98, 1996 WL 192924 at *7, that's the District of the

11 Vermont, 1996. That was affirmed by the Second Circuit at 113

12 F.3d 1230. And I will quote here, "The length of the

13 investigation, the investigative techniques used, and the fact

14 that the defendant was not initially a target of the

15 investigation are all irrelevant pursuant to" the principle

16 that the government's failure to use particular investigative

17 techniques does not tend to show that the defendant is not

18 guilty. See, for example, *United States v. Duncan*, No. 18 CR

19 289, 2019 WL 2210663 (S.D.N.Y. 2019); see also, *United States*

20 *v. Aleynikov*, 785 F.Supp.2d 46, 65 (S.D.N.Y. 2011).

21 The other two cases the defense cites, neither of
22 which is binding on the Court, don't suggest anything different
23 than the law I just referred to. In *Bowen v. Maynard*, the 10th
24 Circuit held that *Brady* evidence in the government's possession
25 was material because it suggested that another likely suspect

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1 did not have an alibi and suggested that a photo lineup was
2 unduly suggestive. 799 F.2d 593, (10th Cir. 1986). The court
3 stated that, if disclosed, "the defense could have
4 cross-examined the detectives about their decision to use the
5 photographs" that they did as well about their failure to
6 corroborate the other suspect's alibi.

7 And the defense cites another *Brady* violation in
8 *Lindsey v. King* where the Fifth Circuit found that a police
9 report was material under *Brady* because it showed key witnesses
10 to a murder had changed their story, which on cross-examination
11 would have meant the destruction of the witness's
12 identification and the discrediting in some degree of the
13 police methods employed in assembling the case against the
14 defendant. *Lindsey v. King*, 769 F.2d 1034, (5th Cir. 1985).

15 These two examples of focused cross-examination to
16 impeach a witness that testified to the defendant's guilt and
17 thereby throw the product of the government's investigation
18 into doubt are far afield from the specifics of what the
19 defense proposed here. In its brief, the defense seeks to
20 affirmatively -- and I will quote from their brief -- "call FBI
21 case agents as witnesses" to ask who they talked to, what
22 documents they subpoenaed, and when. *See*, defense's response
23 at 40. But as the Second Circuit explained in *Saldarriaga*, the
24 government's use or non-use of certain investigative techniques
25 does not tend to show the defendant's innocence of the charges.

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1 The defense also seeks to elicit evidence of the
2 public outcry and scrutiny that preceded the decision to charge
3 the defendant. The defense refers to public statements made by
4 assistant United States attorneys -- not those appearing in the
5 case -- to suggest that Ms. Maxwell was charged for improper
6 reasons.

7 The Court finds that this specific proffered evidence
8 is irrelevant to the charged conduct and, therefore,
9 inadmissible.

10 To the extent that the defense's affirmative evidence
11 in this regard would have some marginal probative value, it is
12 substantially outweighed by 403 prejudice. *See, for example,*
13 *United States v. Hill*, 12 CR 214, 2014 WL 198813 (E.D.N.Y.
14 2014), affirmed by the Second Circuit, 658 Fed. Appx. 600.

15 Here's the reason for that 403 analysis:

16 First, investigative details are likely to confuse the
17 jury about the proper standard for determining Ms. Maxwell's
18 guilt by suggesting that the government's choices of
19 investigative techniques are relevant to whether guilt is
20 proved beyond a reasonable doubt. Moreover, I will instruct
21 jurors, as is standard, to the effect that the government is
22 not on trial. And that standard charge can be found in many
23 cases. Admitting testimony on the investigation would confuse
24 the jury once it's received that instruction.

25 Second, these lines of argument are likely to

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1 substantially confuse and delay the trial. The evidence
2 outlined in the defense's papers, including who was interviewed
3 and when, what documents were subpoenaed and other details of
4 investigations in two different states and different time
5 periods would substantially expand the scope of the trial.
6 Exactly what steps investigators took is not a simple question,
7 of course. The government would likely present a contrary
8 account of events, leading to trials within trials on what law
9 enforcement did over the course of years. This prejudice would
10 substantially outweigh any minimum probative value that might
11 be gained from such a far-flung endeavor.

12 Third, as to prejudice, the evidence would be
13 cumulative, demonstrating that an investigation was "hasty" and
14 not thorough is at best repetitive of the defense's arguments
15 that the government collected insufficient evidence of guilt.
16 That point is made most clearly and directly by focusing on the
17 evidence or lack of evidence and credibility or lack of
18 credibility of the witnesses presented at trial.

19 The second piece of guidance I can provide now is that
20 the Court will exclude much of the evidence outlined in the
21 defense's papers of the government's alleged motives for
22 investigating and charging Ms. Maxwell. This evidence includes
23 but is not limited to the Miami Herald article, statements from
24 Attorney General William Barr and the like.

25 The evidence presented by the government in this trial

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1 is the relevant basis for the jury's determination of guilt or
2 innocence. Why and when the government conducted the
3 investigation is not relevant. If the defense believes the
4 government has a legally improper motive for prosecuting
5 Ms. Maxwell or somehow fabricating evidence or suborning
6 perjury or the like, the Second Circuit has made clear that the
7 proper remedy is to file a motion for the Court to consider.
8 See, *Regan*, 103 F.3d 1082. Absent that, the law is clear that
9 for purposes of the jury, "the government is not on trial."
10 *United States v. Knox*, 687 F.App'x 51, (2d Cir. 2017).

11 Moreover, evidence of motive would be highly
12 prejudicial. For the reasons I explained a moment ago, it
13 would confuse jurors as to the proper standard of guilt to be
14 applied in the case. Indeed, the defense's outlined evidence
15 of improper motives is strongly suggestive of jury
16 nullification because it suggests a vindictive or political
17 prosecution which is rightly a matter reserved to the Court.

18 Calling witnesses to testify to the government's
19 motive would substantially expand the scope of trial, rely
20 likely on hearsay and other inadmissible evidence. So what
21 motivated a particular investigative step or charging decision
22 of course doesn't have a black or white answer, and the defense
23 would have one story and the government another, neither of
24 which would assist of the jury in deciding Ms. Maxwell's guilt
25 or innocence of the charges here based on of the government's

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1 ability to prove its case beyond a reasonable doubt.

2 Third piece of guidance: The Court will exclude from
3 evidence the non-prosecution agreement, both its existence and
4 its particular terms. The defense argues the NPA is relevant
5 to the bias and financial interest of two witnesses. One
6 anticipated witness received immunity from criminal prosecution
7 under the NPA. Additionally, under the NPA, Epstein agreed to
8 pay for a lawyer for an alleged victim who was anticipated to
9 testify and agreed not to contest her civil suit against him.
10 The civil suit ended in a settlement with respect to an alleged
11 victim.

12 Of course, defendants are always able to cross-examine
13 witnesses about relevant bias. For example, cross-examination
14 about civil litigation or civil claims against Epstein or
15 others and related financial incentive are fair grounds.
16 Moreover, cooperating witnesses are commonly cross-examined
17 about how testimony may affect the sentence that they receive.
18 And if it were the case that any witness were to receive
19 testimonial immunity in this case, the defense may
20 cross-examine about that. But the defense has not explained
21 any bias or incentive to fabricate that results from or relates
22 to the NPA. Regardless of how the witness covered by the NPA
23 might testify, that witness will remain protected under the NPA
24 in the Southern District of Florida, and as I already ruled,
25 the NPA does not provide protection in the Southern District of

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1 New York.

2 Similarly, no matter how a witness who has a
3 settlement or financial incentive testifies, those benefits are
4 not received under the NPA, so I don't see any theory of bias
5 that would be relevant that the defense has articulated with
6 respect to the NPA.

7 Moreover, even if there were some relevance, it would
8 be substantially outweighed by a significant risk of 403
9 prejudice from introducing the NPA. The jury would need to be
10 instructed on what the non-prosecution agreement is, and would
11 need to have its terms explained. In particular, NPA, of
12 course, is controversial and complicated and has a complicated
13 background. There's a risk of undue delay, juror confusion,
14 and improper suggestions of sympathy or nullification made to
15 the jury on the basis of the NPA.

16 I will be clear, it's not clear to me the NPA could
17 never be admitted, but the rationale now provided by the
18 defense in its papers does not justify admission based on the
19 balancing of 401 and 403 factors.

20 Fourth guidance: The government's charging decisions
21 are likely not relevant and therefore inadmissible. The
22 government didn't indict Ms. Maxwell by the end of the Florida
23 investigation, and the government didn't indict Ms. Maxwell
24 when it indicted Jeffrey Epstein originally in New York. As
25 the Second Circuit stated in *White*, charging decisions can be

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1 admissible under the usual rules of relevance. In *White*, the
2 court determined that a prior charging decision was admissible
3 because it bore directly on the credibility of a witness that
4 testified at the defendant's trial.

5 As currently proffered by the defense, the rationale
6 doesn't apply here. For example, according to the defense, an
7 alleged victim's statement to the FBI previously did not
8 implicate or exculpate Ms. Maxwell, but her statement today
9 does implicate her. On the basis of that statement, and
10 assumedly other evidence available to them and a host of
11 reasons, officials in the Southern District of Florida decided
12 to not indict Ms. Maxwell at that time. That charging decision
13 could be understood as a determination that in 2008 the
14 government lacked sufficient evidence of Ms. Maxwell's guilt,
15 but the decision not to charge -- or it could mean any number
16 of a host of reasons, but the decision not to charge has little
17 probative value that the Court can see as to this case.

18 Charging decisions, as I said, are made for a host of
19 reasons. Trying to sort through those reasons would be
20 prejudicial pursuant to 403 both because they would require
21 significant time to explore and because juror confusion would
22 be likely. Any consideration of the government's decisions
23 would also likely rely on hearsay or other inadmissible
24 evidence. More importantly, unlike in *White*, those officials'
25 assessments of the evidence in Florida in 2008 is not relevant

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1 to the jury's decision now, which is whether there is evidence
2 of Ms. Maxwell's guilt beyond a reasonable doubt as the
3 government will put its case to the jury.

4 Now there is a difference between admitting a witness'
5 prior statements for impeachment purposes, which is protected
6 by the confrontation clause, and admitting prior charging
7 decisions. In a case analogous to this one on this issue,
8 *United States v. Borrero*, another district court judge held
9 that a defendant could permissibly cross-examine a witness
10 about their prior statement to law enforcement in which they
11 accused a different individual of the crime for which the
12 defendant was later charged. 2013 WL 6020773 (S.D.N.Y. 2013).
13 That case docket is 13 CR 58. But the court there did not
14 admit the charging decision that the early investigation had
15 ended in a nolle, because it would confuse jurors, require
16 extended factual disputes, and was, at best, cumulative of the
17 witness's statement. As I have explained, the same would
18 appear to be true here.

19 Fifth piece of guidance: In contrast to what I
20 indicated may not come in, the Court will permit relevant
21 cross-examination of the government's witnesses. Defense seeks
22 to impeach the credibility of some witnesses by admitting those
23 witnesses' prior statements to the government that purportedly
24 did not implicate Ms. Maxwell. This use of cross-examination
25 to impeach a witness that has allegedly changed her story to

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1 law enforcement is exactly the kind of attack on the
2 thoroughness of the government's investigation that the Fifth
3 Circuit approved in *Lindsey v. King*. Provided that the rules
4 for admitting prior inconsistent statements are satisfied, the
5 Court concludes that this line of evidence is relevant and
6 admissible.

7 The defense may also cross-examine about witnesses'
8 motives or biases for testifying, including, for example, the
9 witnesses' motives for implicating Ms. Maxwell after Jeffrey
10 Epstein's death. Admitting prior statements on
11 cross-examination may require providing the jury some
12 background information about the prior investigations so that
13 the prior statements are understood in the proper context and
14 the jury is provided necessary background to understand that
15 evidence.

16 (Continued on next page)

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1 THE COURT: (Continuing)

2 I imagine this can be done through cross-examination
3 questions if the witness has personal knowledge. I would also
4 encourage the parties to discuss stipulations in this regard to
5 provide the jury any necessary and non-prejudicial context or
6 background, or other proposals for permitting the jury to
7 understand the background or context without crossing over into
8 the 403 prejudice line.

9 I also would permit the defense to cross-examine law
10 enforcement officers about the investigative steps that were
11 taken if the government puts the thoroughness of the
12 investigation into issue as this, too, would be permissible
13 impeachment and cross.

14 These articulated lines of cross-examination of
15 government witnesses would be relevant to impeach a witness by
16 suggesting bias or otherwise implicating their credibility.
17 Moreover, denying Ms. Maxwell these lines of questioning would
18 have implications under the confrontation clause. The Court
19 expects that the probative value would not be substantially
20 outweighed by 403 prejudice if done along the lines of what I
21 have indicated, especially if accompanied by a limiting
22 instruction by the Court that, for example, prior inconsistent
23 statements are to be considered for their impeachment value and
24 the like.

25 Similarly, the Court may instruct the jury that

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1 counsel made only a good faith -- actually, I will retract that
2 last sentence.

3 At base, the Court encourages the parties to confer on
4 appropriate process for putting background information in front
5 of the jury, as necessary, to allow the kinds of
6 cross-examination that would be permissible and required under
7 the relevant law.

8 Let me pause and ask counsel if they have any
9 questions with respect to the guidance I have offered at this
10 time. Obviously there may be issues we will need to take up as
11 we go.

12 Ms. Moe?

13 MS. MOE: Not from the government, your Honor. Thank
14 you.

15 MR. EVERDELL: Your Honor, Christian Everdell.

16 Not at this time, your Honor.

17 THE COURT: Thank you.

18 No. 6, evidence that goes to consent issues.

19 The government requests to exclude evidence or
20 argument regarding consent. Now let me ask counsel, it seems
21 to me the issues implicated in this motion overlap, at least
22 potentially, to the issues raised and to be discussed in the
23 412 motion and I am wondering if we should at least begin by
24 taking it up at that time, as necessary.

25 MS. MOE: Your Honor, the government agrees that makes

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1 sense to address this issue at the same time.

2 MS. STERNHEIM: We agree.

3 THE COURT: So we will defer on that. In light of the
4 overlap on the 412 issues we will take that up at the 412
5 hearing.

6 Government's 7. The government argues that before
7 offering evidence or argument of Ms. Maxwell's failure to
8 commit other bad acts it should require the defense to proffer
9 the basis and the relevance of such evidence. Let me hear from
10 the government what the specific concern is here and then I
11 will speak to the defense.

12 MS. MOE: Yes, your Honor. Thank you.

13 The concern here is what the defense has flagged in
14 its opening papers relating to statements by other victims who
15 were interviewed during the course of the government's
16 investigation. Evidence along those lines, if proffered in an
17 opening statement, or if asked about in cross-examination of a
18 law enforcement officer, would be inappropriate and hearsay.
19 Such evidence could only come in at trial, if at all, if the
20 defense called, as defense witnesses, victims who were not at
21 issue in this case. And so, for that reason, your Honor, the
22 defense should be precluded from opening on this issue unless
23 and until they proffer which victims these statements would
24 come through, who they would anticipate calling as defense
25 witnesses at trial so the Court can assess whether that is

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1 relevant at all.

2 As the government set forth in its moving papers, the
3 defendant is not charged with trafficking certain victims and
4 so whether or not the defendant is guilty of those crimes is
5 irrelevant before this jury.

6 THE COURT: Ms. Sternheim, any mention on opening with
7 respect to this line of --

8 We will ask everyone please make sure your masks are
9 on -- counsel, fully on -- unless you are at the podium.

10 MS. STERNHEIM: Judge, I just want to say that we are
11 honoring your one counsel rule but we have designated various
12 topics.

13 THE COURT: Appreciate it.

14 MS. STERNHEIM: So if you will allow us?

15 THE COURT: Go ahead.

16 MS. MENNINGER: Your Honor, I don't believe that we
17 will be opening on these issues but I think the government is
18 understating what is charged in the indictment. They have put
19 forth an indictment that does not just allege the four main
20 accusers, rather they have set forth a conspiracy that they
21 claim involves a number of other unnamed individuals, and I
22 believe they have proffered an intent to put other evidence
23 about unnamed individuals in their exhibits, in their trial
24 testimony. For example, there are a number of exhibits that
25 they've set forth that come from a time period outside of the

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1 conspiracy and so forth. So it is our position that if they
2 open the door to evidence about anyone other than these four
3 then we would, likewise, be able to talk about the fact that
4 those other individuals were interviewed by the government and
5 said that Ms. Maxwell is not involved, was not there, and was
6 not a part of the activities that they're talking about. None
7 of the cases that the government cited had to do with a
8 co-conspirator. The evidence was just because a defendant did
9 not act in conformity with the charged conduct on a separate
10 occasion, couldn't be set forth by the defense.

11 THE COURT: Do you agree with that principle?

12 MS. MENNINGER: Yes, your Honor. If it is good
13 character evidence, generally I understand the rules of
14 evidence wouldn't apply, but what we have here is a 10-year
15 charged conspiracy with an intent by the government to allude
16 to other individuals. To the extent they try to put on
17 evidence in the form of message pads or other types of evidence
18 that refer to other people, then I think we have the ability to
19 confront that evidence with the fact that Ms. Maxwell was
20 reported by those individuals not to have been involved.

21 THE COURT: Ms. Moe?

22 MS. MOE: Thank you, your Honor.

23 The government agrees that this issue can be deferred
24 until trial unless and until this becomes an issue, provided
25 the defense counsel doesn't intend to open on this issue.

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1 However, even if this became an issue at the trial, the remedy
2 would be to permit the defense to call these relevant witnesses
3 to talk about whether the defendant was or was not involved in
4 their sex trafficking. The remedy would not be to permit
5 defense from cross-examining law enforcement agents about
6 hearsay statements that other individuals provided to them. It
7 would be extremely confusing for the jury to be hearing,
8 through law enforcement agents, the statements of these
9 individuals to assess whether or not those individuals
10 implicated the defendant or simply said nothing about the
11 defendant. And so, the government submits that the only way
12 that this could come in at trial would be if the defense called
13 those witnesses themselves and, of course, it is difficult to
14 determine the potential relevance, if any, of testimony along
15 those lines, and so the government respectfully submits that
16 none of this should be offered at trial unless and until there
17 is an offer of proof along those lines.

18 THE COURT: Ms. Menninger?

19 MS. MENNINGER: Your Honor, whether someone said no
20 one else involved or didn't implicate our client is not
21 hearsay, it is the absence of a statement. So I don't
22 understand the government's position that if an investigator --

23 THE COURT: It is not the absence of the statement,
24 right? If you are trying to put in an out-of-court statement
25 from someone who said that Ms. Maxwell wasn't involved, it is

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1 an out-of-court statement you are putting on for the truth, it
2 is hearsay.

3 MS. MENNINGER: Slightly different, your Honor.

4 If a witness says they interviewed -- if a law
5 enforcement says they interviewed another accuser and that
6 accuser never said that Ms. Maxwell was involved, that's not a
7 hearsay statement. They just didn't mention her, it is the
8 absence of a statement. And as your Honor just ruled in terms
9 of the thoroughness of the investigation, if there is evidence
10 that the government puts on about these other accusers I think
11 that's what opens the door. It is not us opening the door, it
12 would be them submitting evidence that other people were
13 victims without putting those people on, putting on message
14 pads that had their names on it, and then precluding us from
15 introducing evidence that none of those individuals implicated
16 Ms. Maxwell.

17 THE COURT: Right. So, if the government does that
18 you are not precluded from putting other evidence on. The
19 question is what evidence would it be and would it be
20 admissible under the relevant rules of evidence. I am not sure
21 I can resolve that in the abstract. It sounds like neither
22 side intends to open with respect to this issue and I think we
23 largely agree on the legal principles. Tell me if you need
24 more guidance for purposes of opening or preparing your case.

25 Ms. Menninger?

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1 MS. MENNINGER: No, your Honor. I think it depends on
2 the trial testimony.

3 THE COURT: Ms. Moe?

4 MS. MOE: No, your Honor. Thank you.

5 THE COURT: It sounds like the government does need to
6 think about its opening and whether reference to non-testifying
7 alleged victims would open the door, potentially, to the issue.

8 MS. MOE: Yes, your Honor. And it remains the
9 government's position that, to the extent the defense is
10 offering anything along these lines, it would be for the truth
11 and, therefore, hearsay. But given the fact that the parties
12 don't intend to open on this issue, we don't believe our
13 opening statements would open the door to this issue either, we
14 are happy to raise this issue at the appropriate time.

15 THE COURT: OK.

16 MS. MOE: Thank you, your Honor.

17 THE COURT: OK. Thank you.

18 Next is government 8 which are prior statements of
19 Ms. Maxwell. I think I come away from the papers agreeing with
20 the defense that this one may be premature but, Ms. Moe, what
21 is the specific concern? What are prior statements that you
22 are worried about here?

23 MS. MOE: Yes, your Honor.

24 For example, the government has produced to the
25 defense in discovery a large volume of electronically-stored

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1 information including e-mails between the defendant and Jeffrey
2 Epstein. It is difficult for the government to determine in
3 the abstract what the defense might point to, but that might
4 include, for example, a false exculpatory statement. And so
5 the government's view is unless and until there is a proffer
6 from the defense about a specific statement, that the defense
7 should be precluded from offering a statement along those lines
8 in opening statements or otherwise.

9 THE COURT: Who is taking this one?

10 MR. PAGLIUCA: Your Honor, good morning. Jeffrey
11 Pagliuca for Ms. Maxwell.

12 Your Honor, this is a trial time decision. It depends
13 on what witness is testifying and whether or not there is a
14 relevant exception to the hearsay rule. I mean, we understand
15 the rules, we will follow the rules, and if the witness
16 testifies and it becomes relevant, we will ask the question.
17 If there is an objection, the Court will resolve the objection.

18 THE COURT: And you understand you are going to be
19 restrained by what one might say is an asymmetry between the
20 government's ability to use out-of-court statements by the
21 defendant and the defense's inability to do that, absent some
22 other --

23 MR. PAGLIUCA: Absolutely, your Honor.

24 THE COURT: OK.

25 MR. PAGLIUCA: We understand the hearsay rules.

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1 THE COURT: From your perspective, anything further
2 that could be addressed at this time or needs to be addressed?

3 MR. PAGLIUCA: On this topic your Honor?

4 THE COURT: Yes.

5 MR. PAGLIUCA: No.

6 THE COURT: Ms. Moe?

7 MS. MOE: No, your Honor. Thank you.

8 THE COURT: The next is government 9 which is to
9 preclude evidence or argument sounding in nullification. I
10 agree with the defense that there is no need for me to rule on
11 this presently. I trust that defense counsel knows well the
12 clear rules around any such arguments so it is a bit hard to
13 think about what guidance I can offer here.

14 Ms. Moe, is there a specific concern you want to
15 raise?

16 MS. MOE: Thank you, your Honor.

17 Aside from the examples we proffered in our motion,
18 there is nothing in particular that this motion is aimed at and
19 so I don't think anything more along those lines to address
20 today.

21 MS. STERNHEIM: Nothing at this time.

22 THE COURT: OK. So nothing referenced with respect to
23 the government's concerns about nullification would be
24 implicated in the anticipated opening?

25 MS. STERNHEIM: That is correct.

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1 THE COURT: Government 10. Let me say, as a
2 preliminary matter, the government requests that the entirety
3 of this motion be sealed. I have read the government's letter
4 and the footnote 11 in the motion. In my mind they don't
5 justify sealing. As best I can understand the argument the
6 government is saying that the defense should be precluded from
7 make a certain argument because there is no evidence in support
8 of it. If the government is right about that then pretrial
9 publicity would amount to coverage that there is no evidence of
10 that argument. If the government is wrong about that then the
11 evidence in argument comes in so there is no prejudice either
12 way. Frankly, I think the theory of prejudice here runs
13 counter to the whole project of pretrial motion *in limine*
14 practice which is to litigate, for purposes of trial
15 preparation and trial efficiency and opening statements and the
16 like, what's in and what's out. That's going to sometimes
17 require litigation on what's out. So I don't see a basis to
18 seal this and I think we can discuss it today.

19 But let me begin by simply asking the defense if it
20 intends to make the argument that is outlined in the
21 government's motion 10.

22 MS. STERNHEIM: Your Honor, it is too soon to say what
23 we are going to do at trial. Certainly we have no burden of
24 putting on a case and I know the government is well aware of
25 that, but insofar as the government seeks to preclude us from

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1 raising any issues concerning Ms. Maxwell, I think it is
2 entirely premature and it will depend upon testimony from their
3 witnesses and they know well what their witnesses have said
4 that could support that. I don't think we need to delve into
5 that at this point. It is not anything that we are opening on.
6 We need to see how the evidence plays out.

7 THE COURT: OK.

8 MS. MOE: Your Honor, if the defense is not opening on
9 this issue we are certainly happy to raise it during the trial.
10 We would ask that the defense be required to front this issue
11 before asking witnesses questions about this on
12 cross-examination because for the reasons set forth in the
13 government's moving papers, the government submits that
14 evidence along these lines would not be relevant.

15 Briefly, your Honor, with respect to the sealing
16 issue, the government understands the Court's concerns and
17 would certainly not object to unseeing this portion of the
18 motion at the conclusion of the trial but I --

19 THE COURT: I don't see why -- I just don't see how --
20 obviously some sealing on issues is appropriate in order to
21 protect interests that are in play during the course of the
22 trial. This just doesn't fall within that. So my inclination
23 is, no -- and I have not had the ability to go through the
24 complicated set of sometimes overlapping, sometimes not
25 overlapping redaction requests contained throughout these

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1 papers which is why I ordered you just get them up on the
2 docket rather than deprive the public of seeing the bulk of
3 what is contained in the motions, but I looked at this one and
4 I don't see a basis for sealing it in its entirety and I don't
5 see a basis for redaction so I'm not going to grant that
6 request.

7 MS. MOE: Understood, your Honor.

8 THE COURT: I think there is nothing further on 10.
9 No issue for opening. We will figure out a process, once I
10 have had a chance to rule on the remainder of the sealing
11 requests, for putting on the docket any redactions that I don't
12 approve of and we will take this up if it arises. I think
13 everybody understands, obviously, that I trust, again, the
14 defense will have a basis for an argument that they're making
15 and to the extent this issue arises, raise it, so that we can
16 deal with it.

17 MS. STERNHEIM: We will.

18 THE COURT: Thank you.

19 Government 11. The final issue in the government's
20 motion is request to preclude the defense from arguing that the
21 defendant was a "prevailing party in civil litigation." I will
22 grant this motion. The fact that the defendant was deemed a
23 prevailing party after a settlement in civil litigation seems
24 irrelevant and highly prejudicial. The defendant, as I
25 understand it, was deemed a prevailing party following a

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1 voluntary dismissal of civil litigation pursuant to a
2 settlement agreement, and after the dismissal the defendant
3 sought costs as a prevailing party under Federal Rule of Civil
4 Procedure 54(d)(1), and at least as described in the papers the
5 alleged victims opted to pay the fairly minimal amount sought
6 rather than burden the court and other resources with continued
7 litigation.

8 The fact that the defendant received costs pursuant to
9 civil procedure 54(d) after a civil settlement just has no
10 relevance to the charges at hand as far as I can tell and there
11 is substantial danger of confusing the issues and misleading
12 the jury. If the defense elicited that the defendant was the
13 prevailing party, a layjuror would almost certainly assume that
14 that was some kind of adjudication on the merits relevant to
15 this case but there is no evidence that there was any relevance
16 adjudication on the merits and certainly none relevant to the
17 case. Any probative value gained by the introduction would be
18 substantially outweighed by juror confusion and the waste of
19 time needed to explain the differing postures of the current
20 case and the prior civil litigation. So on those 401/403
21 balancing grounds the government's motion in this regard is
22 granted.

23 Any questions before I turn to the defense motions?

24 MS. MOE: Not from the government, your Honor. Thank
25 you.

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1 MS. MENNINGER: Your Honor, very briefly on the last
2 issue. I assume that there won't be any argument by the
3 government or their witnesses that they believe that they had
4 an adjudication on the merits, in other words both the victims'
5 compensation fund and the civil litigation, there was no right
6 of confrontation, Ms. Maxwell wasn't a party to those
7 settlement agreements. So, to the extent the government tries
8 to suggest to the jury that they somehow had an adjudication,
9 someone else found that their claims had merit, I think that
10 would be confusing to the jury as well and I assume it would
11 also be deemed by this Court to open the door to an explanation
12 from the defense about what really happened in those
13 proceedings.

14 MS. MOE: Thank you, your Honor.

15 The government does not intend to elicit any testimony
16 from the victims about being a prevailing party in any civil
17 litigation or otherwise. To the extent the government elicits
18 any testimony about civil litigation from the victims it would
19 only be in order to front that issue for the jury in
20 anticipation of cross-examination along those lines.

21 THE COURT: Right.

22 MS. MOE: The government certainly wouldn't be
23 offering that evidence to suggest to the jury in any way that
24 those were adjudications on the merits, nor could we, those
25 were civil settlements.

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1 THE COURT: Anything further on that, Ms. Menninger?

2 MS. MENNINGER: I didn't hear any reference to the
3 victim's compensation fund but there certainly was no
4 adjudication on the merits by a fund that Ms. Maxwell had no
5 party to the settlement.

6 THE COURT: Correct.

7 Same response, Ms. Moe?

8 MS. MOE: Yes, your Honor. And in fact, again, we
9 would only be eliciting information about that on direct
10 examination to front that issue for the jury in anticipation of
11 cross-examination along those lines. To the extent the defense
12 wishes not to cross-examine the victims about the victims
13 compensation program, we certainly agree not to address that at
14 all on direct examination.

15 THE COURT: I imagine the defense does anticipate
16 referring to civil settlements and the victims' compensation
17 fund as part of its cross of anticipated witnesses, correct?

18 MS. MENNINGER: That is correct, your Honor.

19 THE COURT: So the government can front those issues
20 to take out the sting. To the extent there is any
21 implication -- it would not be remitted to make any implication
22 as to what those settlements or receiving of funds would mean
23 as to the issues relevant here. The only issue relevant here,
24 as I see it, goes to incentive for bias and credibility issues.

25 MS. MENNINGER: It just depends on what the witness

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1 says, your Honor. I agree that these are issues that it's
2 important for the Court to be aware of before trial but I can't
3 predict, and I'm not really sure that the government can
4 predict, what their witnesses will say or suggest in their
5 actual testimony. When they open the door through fronting it,
6 it may be that they say something that suggests that there was
7 someone who believed them, that there was a victims'
8 compensation fund that believed them. If those kinds of words
9 are used by the witness, then that becomes problematic in terms
10 of our ability to be hamstrung in cross-examination that there
11 was no actual confrontation during that process. So, depending
12 upon what the witnesses say we would re-raise this but I do
13 think it's important for the Court to sort of have that in mind
14 when the government is trying to use evidence to front an issue
15 but then potentially opening the door to us being open to cross
16 on the same type of language that their witnesses used.

17 THE COURT: Ms. Moe?

18 MS. MOE: Your Honor, again, the government doesn't
19 anticipate that the testimony would come out that way but, in
20 any event, I think with respect to the specific concern defense
21 counsel has raised, to the extent it opened the door I don't
22 believe it would open the door to separate collateral issues
23 about a separate civil lawsuit and resolution of that civil
24 lawsuit.

25 THE COURT: Yes.

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1 MS. MOE: But, beyond that, your Honor, we don't
2 anticipate this would be an issue.

3 THE COURT: OK. I think we are in agreement.

4 My clerk noted I inadvertently skipped over Government
5 so we will return to that. This is the government's
6 expectation that the testimony of certain witnesses would
7 include statements by individuals that are not testifying and
8 the government argues that the defense can't attack the
9 credibility of those non-testifying individuals because their
10 statements would not be admitted for their truth but, for
11 example, their effect on the testifying witness and the like.

12 Again, I think without more specificity it is
13 difficult to make a definitive ruling but I'm happy to hear
14 examples to give some guidance.

15 Ms. Moe?

16 MS. MOE: Thank you, your Honor.

17 I think there will be limited testimony from a victim
18 about her interaction with other victims. I think the
19 statements that would come in from those other victims would be
20 offered not for their truth but because they are instructions,
21 they would be offered for that effect on listener and to
22 explain the course of events that followed. We don't
23 anticipate offering any statements from non-testifying victims
24 for their truth and so we don't anticipate opening the door to
25 a line of cross-examination about their credibility. And so,

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1 for that reason, we would ask that the defense be precluded
2 from opening on this issue or otherwise raising issues related
3 to the credibility of individuals who would not be testifying
4 at this trial including not only non-testifying victims but
5 also attorneys.

6 MS. MENNINGER: Your Honor, even the statement "a
7 non-testifying victim" is very loaded because who is going to
8 testify that that person is a victim and on what ground?
9 That's the problem.

10 THE COURT: Well, I wouldn't allow testimony by a
11 witness about a characterization that goes to a legal issue so
12 of course they could testify about observations involving other
13 people. I can imagine instances in which they testify about
14 statements of others not offered for the truth but I wouldn't
15 anticipate the government would attempt to do any of that via
16 any characterization of those individuals that go to legal
17 conclusions relevant to the jury's role.

18 Do I have that right, Ms. Moe?

19 MS. MOE: Yes, your Honor.

20 MS. MENNINGER: It is interesting, because in their
21 offer of proof they actually say that one witness is going to
22 talk about another person being a victim of sexual abuse and
23 that second person isn't going to testify, and the question of
24 whether that person was a victim of sexual abuse would turn on
25 the age at which they were conducting certain activities. And

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1 so, just as we were arguing earlier, your Honor, if the
2 government is trying to put on evidence about other people
3 being victims, then that opens the door to us challenging that
4 other person's credibility. I don't have any issue with the
5 way we briefed it which was it just depends on what is said by
6 the witness and we will certainly re-raise these issues. But,
7 the government can't have their cake and eat it, too. If they
8 want to put on evidence about a broad number of supposed
9 victims then we have the obligation, ethically, to challenge
10 whether or not those other individuals are in fact victims.

11 THE COURT: Well, I think maybe speaking in the
12 abstract is where the fine points get lost. So if a testifying
13 witness testifies about something that she observed involving
14 the defendant and another individual, that doesn't open the
15 door to attacking the credibility of that other individual.

16 Agree to that basic premise?

17 MS. MENNINGER: Correct, your Honor; an observation
18 alone.

19 THE COURT: And if the witness testifies that another
20 individual, using the name or pseudonym -- if that is what is
21 appropriate in light of the Court's ruling, I don't have it
22 firmly in mind at this point but, just as an example: Someone
23 told me to go to somebody's home. That doesn't put the
24 credibility of the out-of-court witness in issue, does it?
25 Because that is not being offered for the truth. Now, if it

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1 says go to so and so's home at the following address --

2 MS. MENNINGER: Or what is going to happen there and
3 why do I think it is going to happen there -- those kinds of
4 things -- that is really getting into the circumventing the
5 not-for-the-truth issue.

6 THE COURT: I don't think those other points could
7 come in because they would be for the truth.

8 MS. MENNINGER: Hearsay, right.

9 THE COURT: So they don't come in, obviously you can't
10 attack credibility.

11 Ms. Moe, do you disagree with any of that?

12 MS. MOE: No, your Honor. The government agrees. And
13 if this issue arises, we would certainly agree to a limiting
14 instruction about those out-of-court statements not being
15 offered for their truth. We don't anticipate that there would
16 be any testimony from an out-of-court declarant who is a victim
17 offered for its truth at this trial, and so we don't anticipate
18 option the door.

19 THE COURT: If the government thinks any of these, of
20 what it does intend to offer, is close to the line on that
21 question, it must raise them before inquiring or raising it in
22 opening.

23 MS. MOE: Certainly, your Honor.

24 THE COURT: OK.

25 Anything further on that?

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1 MS. MENNINGER: No. Thank you, your Honor.

2 THE COURT: All right.

3 Anything else before turning to the defense motion?

4 MS. MOE: No, your Honor.

5 MS. STERNHEIM: No, thank you.

6 THE COURT: Defense 1 relates to the government's
7 disclosure of co-conspirator statements. The parties spill a
8 lot of ink about the meaning of prior orders and whether the
9 government has fully met its disclosure obligations as set out
10 by those orders. The government did not violate my orders and
11 the defense motion to preclude the government from introducing
12 any alleged co-conspirator statements is denied.

13 I do think the schedule, as set out in this case, has
14 provided for certainly a vastly earlier disclosure schedule
15 than any other trial over which I have previously presided and
16 I do think the defense is well equipped to know what is coming
17 and can responsibly raise issues that can be dealt with in
18 advance of trial. Here, the defense has the names of the
19 co-conspirators who will be mentioned by the government at
20 trial and it has the government's marked exhibits, and although
21 it doesn't feel like it, we still have a month to go before
22 trial. That said, here is how we will proceed on this point --
23 and this is another homework assignment.

24 By this Thursday, November 4, the government will
25 provide to the defense the categories of the kinds of

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1 co-conspirator statements that it intends to introduce at trial
2 pursuant to 801(d)(2)(E) and specifically representative
3 exemplars of each category whether by exhibit number or
4 anticipated testimony. That is a process that I have used
5 before, I think not infrequently used, in order to try to
6 litigate anything that could be litigated. So the government
7 will do that by November 4th. The defense, bearing fully in
8 mind the well-established law regarding conditional admission
9 of the co-conspirator statements, the defense should indicate
10 to the government, by November 8, any good faith, non-frivolous
11 objections to the introduction of any such statements. After
12 conferring, if there are disputes remaining that wouldn't
13 obviously fall into the law regarding conditional admission,
14 the government shall file a letter, by November 10, justifying
15 admission of exemplars and statements over which the parties
16 disagree. So that's the 10th, and then the defense could put
17 in an opposition, in writing, by November 12th.

18 Any questions about that, Ms. Moe?

19 MS. MOE: No, your Honor. Thank you.

20 THE COURT: Ms. Sternheim?

21 MR. PAGLIUCA: We are clear, your Honor. Thank you.

22 THE COURT: I think it is probably worth maybe just a
23 moment, because it impacts this issue and some other ones, to
24 just discuss one category of potential statements that's been
25 flagged and that's alleged co-conspirator statements that date

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1 after what's alleged in the indictment as of the date of the
2 conspiracy.

3 Let me ask, Ms. Moe, if are you in position to say,
4 does the government intend to seek admission of alleged
5 co-conspirator statements that post-date the dates of the
6 conspiracy alleged in the indictment?

7 MS. MOE: Your Honor, I think I would want a moment to
8 confer with my colleagues about that and so, if possible, we
9 would like to address that in our November 10th letter.

10 In brief, as a preview, I think to the extent there
11 were any statements that post-dated the time frame of the
12 charged conspiracy we would be offering them only to the extent
13 they reference the charged conduct. But, again, I would like
14 to confer with my colleagues and think through that in detail
15 before making a representation to the Court, and so we ask to
16 brief that as well at the same time.

17 THE COURT: Anyone want to take this now? Or just
18 wait?

19 MR. PAGLIUCA: Your Honor, I am happy to wait but it
20 is clear to me that there are post-alleged-conspiracy
21 statements that the government will attempt to introduce and I
22 think we attach what were the representative samples of those
23 statements. And so I don't think it should be a surprise, as
24 we sit here today, what those statements may or may not be. I
25 think whether or not you want to say that those statements go

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1 to something alleged in the indictment doesn't change the
2 801(d)(2)(E) analysis and that is it has to be made in the
3 course of and in furtherance of a conspiracy. So post-event
4 statements that don't have anything to do with furtherance of
5 the conspiracy are simply hearsay and inadmissible.

6 I think that's a pretty simple proposition, your
7 Honor.

8 MS. MOE: Your Honor, among other reasons why we would
9 like time to think about this further and address it in more
10 detail, is that Rule 801(d)(2)(E) is not limited to the charged
11 conspiracy at trial, a statement said in furtherance of the
12 conspiracy even if it is not the charged conspiracy. And so we
13 would want to think through that as well. And we would also
14 want to think through, even if a statement is offered by a
15 co-conspirator, whether it is being offered under Rule
16 801(d)(2)(E) at all. And so we would just ask for additional
17 time to think through that to make sure we give an accurate and
18 thorough representation to the Court.

19 THE COURT: So, I will stick with the process and
20 schedule that I have indicated but I do think we will separate
21 out statements that post-date the conspiracy as charged in the
22 indictment and the government will indicate grounds for the
23 specific introduction of any of those anticipated statements.
24 OK, Ms. Moe?

25 MS. MOE: Yes, your Honor. Thank you.

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1 MR. PAGLIUCA: Yes, your Honor. That's fine.

2 THE COURT: Thank you.

3 Defendants 2 is the admission of certain evidence
4 outlined in the government's 404(b) letter dated October 11,
5 2021. First, as to the defense argument that there has been an
6 inadequate notice under 404(b), I disagree because the
7 government's letter and briefing between the government's
8 letter and the briefing here, the defendant has "reasonable
9 notice" of any 404(b) evidence so the question is whether the
10 evidence can be properly admitted. I think there is two
11 categories of evidence, the first goes to e-mails, and I will
12 speak in the just general description which I think is
13 appropriate. The government may have attempted to redact some
14 general description and to the extent that you have, I disagree
15 with that but I will speak generally -- I'm sorry, the defense
16 requested redaction as to some general description but I don't
17 think it's appropriate. So I'm going to ask the government, if
18 this understanding is correct, that the e-mails reflect
19 instances of the defendant setting up dates that involve women
20 over the age of consent.

21 MS. MOE: Your Honor, I think as we noted in our
22 briefing, for some of the documents it is unclear what the age
23 range is.

24 THE COURT: So you wouldn't be able to prove that it
25 was under the age of consent?

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1 MS. MOE: Exactly, your Honor.

2 THE COURT: For our purposes I think we need to assume
3 over the age of consent, correct?

4 MS. MOE: Your Honor, I think it would be ambiguous
5 from the evidence but we are not proffering them as evidence of
6 conduct with respect to other minors.

7 THE COURT: OK. So, let's just start with the
8 following statement: You are seeking to introduce e-mails that
9 involve the defendant setting up people on dates with women
10 over the age of consent?

11 MS. MOE: Your Honor, because we are not able to
12 determine the age of those individuals --

13 THE COURT: Let's assume that you could for some of
14 them. Right? Are you seeking to introduce those? It is clear
15 that the women involved are over the age of the consent. Are
16 you seeking to introduce those e-mails?

17 MS. MOE: I think the e-mails that the defense has
18 moved to preclude don't say one way or the other the age --

19 THE COURT: You are fighting my hypo. So, to be
20 clear, it is a hypothetical. If you have an e-mail involving
21 the defendant setting someone up on a date with someone who the
22 government knows is over the age of consent on the basis of the
23 argument made here, are you seeking to introduce it?

24 MS. MOE: Yes, your Honor.

25 THE COURT: And why?

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1 MS. MOE: The government respectfully submits that
2 although the defense is free to characterize these as dates,
3 the tenor of the e-mail suggests that she is offering up women
4 largely based on descriptions based on physical descriptions
5 and not in sort of a matchmaking capacity. And so, I think the
6 jury would be free to conclude from those e-mails that the
7 defendant is serving a particular role with respect to the men
8 that she is e-mailing with.

9 THE COURT: Are you suggesting like some kind of
10 financial arrangement?

11 MS. MOE: No, your Honor.

12 I think the issue, as reflected in our briefing, is
13 that a jury may wonder at this trial about the relationship
14 between Ms. Maxwell and Mr. Epstein and why Ms. Maxwell would
15 be willing to serve in a particular role with respect to
16 Mr. Epstein, and it is probative of that issue that she is
17 serving a similar role, albeit in a different context, with
18 other men during that same time frame.

19 THE COURT: On the e-mails, I am excluding them.

20 The indictment charges the defendant with conspiring
21 and aiding and abetting the transport and enticement of minors
22 to engage in illegal sex acts and the commercial sex act
23 e-mails setting up dates between non-minors or meetings,
24 however you want to describe it, involving non-minors are not
25 direct evidence of the crimes charged, they don't arise out of

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1 the same transaction or series of transactions as the charged
2 offenses, they're not inextricably intertwined with the
3 evidence nor necessary to complete the story of the crime on
4 trial. The government doesn't allege that the individuals in
5 these e-mails have anything to do with the crimes charged nor
6 could they on the assumption that they can't establish that any
7 of the individuals are below the age of consent.

8 As for 404(b), I am also not convinced. The
9 government argues that the e-mails show motive, intent, plan,
10 and knowledge. Any potential probative value here would be
11 substantially outweighed by the possibility of confusing the
12 jury. Thus, I grant the defendant's motion as to Government's
13 Exhibits 401 through 404, 409, 410, and 413.

14 The next category is the anticipated testimony that --
15 and this involves someone who has knowledge based -- this goes
16 to the post-date conspiracy charged. This is someone who, as I
17 understand it, has knowledge that post dates the conspiracy
18 alleged; is that right?

19 MS. MOE: That's correct, your Honor; and that
20 testimony will be proffered principally authenticate certain
21 evidence relevant to the charged conduct.

22 THE COURT: OK.

23 Who is taking this? With respect to authenticating
24 evidence, do you have an objection, Ms. Menninger?

25 MS. MENNINGER: Yes, your Honor, because it is

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1 post-dating the alleged conspiracy. For example, there are
2 documents -- I don't know, they weren't specified which
3 documents that this witness intends to authenticate, but among
4 the documents that I believe the witness may attempt to
5 authenticate, they are dated in 2005 and beyond. And so the
6 question really is whether you can -- it is an authentication,
7 one, whether that relates to the conspiracy or not. As we set
8 forth in our reply, your Honor, there is a real concern because
9 a number of, I think, the entire first series of exhibits, are
10 largely taken from a period outside of the charged conspiracy.
11 I think this witness may attempt to authenticate some of those
12 exhibits and they haven't established why that will be relevant
13 to the charged time period of the conspiracy. They really
14 didn't argue 404(b) on this point and we asked for additional
15 time in terms of the direct evidence because we had just
16 received these 400 pages that relate to that particular
17 witness, your Honor.

18 THE COURT: So the basic contention would be if we
19 have a document that, on its face, that post-dates the charged
20 conspiracy. I mean that, alone, is I think the first point of
21 your objection, right?

22 MS. MENNINGER: Yes, your Honor.

23 THE COURT: The authentication issue aside. What is
24 the relevance of a document that, on its face, post-dates the
25 charged conspiracy? Let's start with that, Ms. Moe.

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1 MS. MOE: Yes, your Honor.

2 The category of exhibits that this witness would be
3 authenticating would include, among other things, contact
4 information for the minor victims and so the fact that that
5 contact information and messages from those victims was in
6 Mr. Epstein's residence and, in part, in the defendant's
7 possession is relevant regardless of the time frame and is
8 corroborative of the other evidence at trial.

9 THE COURT: The charged conspiracy ends and then
10 Mr. Epstein maintains addresses of individuals alleged to be
11 victims here. Is that the context?

12 MS. MOE: Yes, your Honor; but more specifically with
13 respect to the two categories of exhibits, the first would
14 include messages that were left at the residence during the
15 time frame of the charged conspiracy, they are dated and
16 include a name of a victim and her contact information and so
17 this witness will be authenticating those. Those documents
18 come from the time frame of the charged conspiracy and were
19 created at the time frame of the charged conduct.

20 With respect to a second category of information --

21 THE COURT: And you have a witness who would
22 authenticate that they were created at the time of the charged
23 conduct which, presumably, wouldn't be somebody who doesn't
24 come onto the scene until after the time period of the charged
25 conduct. Fair to say?

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1 MS. MOE: Your Honor, those records would be
2 authenticated through number of different witnesses; in part,
3 law enforcement officer describing those exact records being
4 seized from the residence in 2005 in their general description
5 and format, witnesses describing the practice for maintaining
6 those records contemporaneously and doing so in the course of
7 their employment.

8 THE COURT: Contemporaneous to what?

9 MS. MOE: At the time the message was made.

10 THE COURT: During the period of the conspiracy?

11 MS. MOE: Yes, your Honor. And that testimony would
12 include testimony about the format of these documents, where
13 they were kept, and the practice for keeping messages along
14 these lines. We think that is consistent with the Second
15 Circuit's rulings on authentication being based on the
16 particulars of a document and their formatting and their
17 contents. So I think this would come in through a number of
18 witnesses and, collectively, at the conclusion of that
19 testimony, we would offer those exhibits based on that
20 foundation.

21 THE COURT: And I don't think I can rule on that in
22 advance until we hear the authentication evidence being
23 offered. What you have proffered I think -- I will hear from
24 the defense -- but it seems like those pieces could add up to
25 authentication.

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1 But take the example, if you would, that a document
2 that, on its face, post-dates the charged conspiracy, for what
3 purpose would you be offering that? And let's use the address
4 book as an example.

5 MS. MOE: Yes, your Honor.

6 With respect to that particular document, the
7 testimony would be that that document belonged to the defendant
8 and that she -- and the document itself would include contact
9 information for some minor victims under a certain heading that
10 has relevance to the case and organized in a certain way that
11 is consistent with victim testimony. So, whether the defendant
12 held on to that or maintained it following the conclusion of
13 the charged conspiracy, it would nonetheless be relevant to
14 establish the defendant's knowledge to confirm her contact with
15 those victims and to be corroborative of other exhibits at
16 trial.

17 THE COURT: If the evidence were that it wasn't
18 created or maintained until after the charged conspiracy, is it
19 relevant?

20 MS. MOE: Yes, your Honor.

21 If, at the conclusion of the conspiracy, the defendant
22 nonetheless memorialized that information about those victims,
23 it would nonetheless be relevant to her knowledge to rebut
24 arguments that she didn't know the victims or have contact with
25 them and so certainly that would be relevant, your Honor.

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1 THE COURT: Ms. Menninger?

2 MS. MENNINGER: Your Honor, I am a little confused but
3 what I think I understand the government is saying is that
4 knowledge after the conspiracy is relevant to the time frame of
5 the conspiracy. I don't believe that the witness we are
6 talking about, who didn't start working until after the time of
7 the conspiracy for Mr. Epstein, would be able to set forth the
8 foundation that they're claiming. I believe that this is more
9 likely to be a trial-time testimony decision because I think
10 there will be some pretty substantial objections to the ability
11 of this witness to authenticate the document which I know your
12 Honor is aware from other briefing, is what we consider to be
13 from a very suspect source and obtained years later. There is
14 a lot of notations and things on it that will not be anything
15 that this witness can attest to. I think it is Exhibit 52.

16 THE COURT: Yes.

17 MS. MENNINGER: I don't think it is relevant to the
18 time period of the conspiracy.

19 THE COURT: Right.

20 I guess the question, given the pieces of
21 authentication that the government intends to offer through
22 different witnesses and what sounds like lines of
23 cross-examination as to those pieces, I think at that point I
24 am potentially -- at least the government will have to proffer,
25 put forward questions and get answers from the witness that

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1 would go to authentication. I just don't know if I am in a
2 position to rule at this point but let me ask both sides if
3 anybody intends -- I mean, take Exhibit 52, is that going to be
4 mentioned in opening?

5 MS. MOE: Your Honor, the government doesn't
6 anticipate opening with respect to Government Exhibit 52 but
7 may address, in opening, other categories of exhibits, for
8 example, the message pads that I just referenced.

9 MS. MENNINGER: Your Honor, that's a problem. In
10 terms of the message pads that have a post-conspiracy date on
11 them without a witness who can authenticate them under any
12 exception under hearsay in opening statements, we would
13 strongly object to that. I still have not heard appropriate
14 grounds to lay a foundation or relevance for those.

15 THE COURT: Yes. Let's take the message pads. Who
16 will authenticate?

17 MS. MOE: Your Honor, a number of witnesses. I think
18 we would be offering those messages at the conclusion of a
19 series of witnesses laying foundation for their authenticity
20 including law enforcement witnesses and employees talking about
21 the circumstances under which messages were maintained but we
22 don't anticipate offering messages in those message books that
23 post-date the time frame of the charged conspiracy.

24 THE COURT: OK. So the government will not mention
25 any message pads that post-date the charged conspiracy in its

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1 opening.

2 MS. MOE: That's correct, your Honor.

3 THE COURT: Ms. Menninger, anything further on that?

4 MS. MENNINGER: Nothing further on that, your Honor.

5 THE COURT: OK.

6 Anything further in this general category that needs
7 to be addressed now, Ms. Menninger?

8 MS. MENNINGER: If there is no other evidence that the
9 government intends to offer via Rule 404(b), then no. There
10 was a reference to another exhibit -- GX- 416 -- in the
11 government's briefing. That was not one of the exhibits that
12 was mentioned in the Rule 404(b) letter. I assume because it
13 was not mentioned in that letter it cannot be offered through
14 404(b). It is of a same type and characteristic of the e-mail
15 that your Honor has excluded so I don't know what the intent is
16 there.

17 THE COURT: Ms. Moe?

18 MS. MOE: Yes, your Honor.

19 We didn't include that exhibit in our notice. We are
20 offering it as direct evidence, unlike the other evidence which
21 were included in our notice. That document is a series of
22 notes. The metadata for that exhibit reflects that the
23 defendant created that series of notes but, unlike the other
24 exhibits outlined in our letter, it doesn't appear that that
25 was directed at a third-party as opposed to Mr. Epstein,

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1 although it is not clear from the document to whom it's
2 directed.

3 MS. MENNINGER: It relates to individuals in their 30s
4 and 20s, your Honor. I'm just unclear how it relates to
5 charged conduct or direct evidence of a conspiracy to abuse
6 underage females.

7 THE COURT: It seems like it falls within my -- it
8 wasn't specifically moved for exclusion but because of the
9 government not including it in its notice but I'm not seeing --
10 I am pulling it up but I'm not seeing a notice -- a basis, from
11 what I am hearing, distinguishing it from my ruling on the
12 e-mails.

13 MS. MOE: Your Honor, the government submits that
14 along with other exhibits at trial, which will establish the
15 defendant's role with respect to Mr. Epstein and her role in
16 particular in setting up sexualized massages for him, that this
17 is corroborative of other exhibits and other testimony at trial
18 that the defendant did in fact serve that role, was willing to
19 do -- take steps along those lines. And so, for that reason --

20 THE COURT: But it involves, clearly, people over the
21 age of consent?

22 MS. MOE: That's correct, your Honor.

23 THE COURT: Let me just pull it up.

24 For the same reasons, 416 is excluded.

25 MS. MOE: Understood, your Honor.

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1 THE COURT: Anything else on this?

2 MS. MENNINGER: No, your Honor. Thank you.

3 THE COURT: Next is Defendant's Exhibit 3 which is the
4 motion to exclude the excerpt which, as I have indicated, we
5 will take up at the Daubert hearing.

6 Let's take a short comfort break. 10-minute break.

7 (Recess)

8 (Continued next page)

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1 THE COURT: We'll pick up with Defense 4. This is the
2 issue of evidence related to alleged Victim-3.

3 Defense seeks to exclude evidence related to this
4 individual that's not probative of the charged conspiracy and
5 inadmissible under 404(b) and 403. There are redactions issues
6 here. Redactions of specific identifying information is
7 permissible here. I don't think that redactions as to some
8 general background information that does not reveal specific
9 identifying information regarding the alleged victims is
10 necessary, but we'll proceed bearing in mind the requested
11 redactions.

12 I want to begin this one with questions for the
13 government. Ms. Moe, so it's a hypothetical. I gather there's
14 statute of limitations issues, but setting the statute of
15 limitations issue aside, if the only evidence in the case
16 pertained to this individual, if all the testimony of this
17 individual is accepted by the jury, could the defendant be
18 found guilty of any crimes charged in the indictment?

19 MS. MOE: With respect, just so I understand the
20 hypothetical, if the only count in the indictment were the Mann
21 Act conspiracy --

22 THE COURT: No, any of the crimes charged, just
23 stipulate to that, but if the only evidence pertains to this
24 individual.

25 MS. MOE: Yes, your Honor. The answer is no. In

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1 particular, because with respect to -- that's why I was
2 clarifying, your Honor. With respect to the Mann Act
3 conspiracies, the particular criminal sexual activity relates
4 to a particular statute in New York. And with respect to the
5 sex trafficking --

6 THE COURT: The particular statute in New York that
7 the government here -- that's 130.053(a), right?

8 MS. MOE: Yes, your Honor.

9 THE COURT: And that establishes 17 as the age of
10 consent for the underlying sexual activity that's charged in
11 the indictment.

12 MS. MOE: That's correct, your Honor.

13 THE COURT: So the Mann Act is going to -- the case
14 that the government is going to prove here is going to
15 incorporate that as the illegal sexual conduct.

16 MS. MOE: That's correct, your Honor.

17 THE COURT: So couldn't be convicted with respect to
18 that count.

19 MS. MOE: That's correct, your Honor. And that's
20 among the many reasons why we submit there's very little
21 potential prejudice of offering this testimony considering its
22 relevance to the counts charged, because given the elements of
23 the offense standing alone and the statute of limitations
24 issue, we think there's no 403 issue here.

25 THE COURT: Well, not just with respect to the Mann

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1 Act, there's no count charged in the indictment for which the
2 defendant could be convicted -- again, setting aside -- I'm not
3 dealing with the statute of limitations issue, put it out of
4 your mind. So assuming no statute of limitations issue, could
5 the defendant be convicted of any count charged in the
6 indictment based on the evidence as it pertains to this?

7 MS. MOE: No, your Honor, we have not charged the case
8 that way, and that testimony alone wouldn't satisfy those
9 crimes charged.

10 THE COURT: And is the government's position that this
11 individual could be deemed a victim for restitution purposes or
12 any legal purpose with respect to the crimes charged in this
13 case and the case that the government is going to put on?

14 MS. MOE: Your Honor, with apologies, I haven't
15 thought through the restitution issue. I would want to confer
16 with my office about that. I'm not certain, your Honor.

17 THE COURT: Well, if the defendant can't be indicted
18 based on this conduct -- again, assuming no statute of
19 limitations issue, assuming that the jury adopts and accepts
20 all of the testimony as true, the defendant couldn't be
21 convicted of any of the crimes charged based on that conduct,
22 how could that individual be deemed a victim of the crime
23 charged?

24 MS. MOE: I understand the Court's point, your Honor.
25 I guess my concern is that the distinction between charging

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1 based on that conduct alone and the evidence based on that
2 conduct alone, we submit that, given the course of conduct in
3 the charged conspiracy, that Minor Victim-3 is a victim of an
4 ongoing conspiracy, which is one of agreement and intent.

5 We submit that her testimony alone wouldn't establish
6 a violation of the Mann Act, and without the other
7 circumstances of other victim testimony, we couldn't establish
8 that there was an ongoing intent to transport minor victims.
9 But given that the crime here is conspiracy and one of
10 agreements and mental states and not about attempts to violate
11 certain statutes or agreements to do so, it's about the
12 intention at the time of agreement during the course of a span
13 of conduct.

14 THE COURT: But it has to be an intention to engage in
15 an illegal act.

16 MS. MOE: That's correct, your Honor.

17 THE COURT: And so I think I need an answer to the
18 question. There is a distinction, surely, between criminality
19 and evidence of criminality. You have evidence of criminality,
20 which is not itself criminality, for sure. You have 403
21 questions and the like. But I need to know the government's
22 position I think for a number of things in issue, including
23 Defendant's 4. So you have confirmed that the defendant
24 couldn't be found guilty of any crimes charged based on the
25 conduct alleged with respect to what you refer to as alleged

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1 Victim-3.

2 MS. MOE: Yes, your Honor.

3 THE COURT: And you're not sure what the government's
4 position is as to whether alleged Victim-3 could in any legal
5 sense be deemed a victim of any of the counts charged, despite
6 the I think necessary, but I wasn't sure of the government's
7 position, with respect to the illegality of conduct involving
8 the victim.9 MS. MOE: Your Honor, with apologies, may I have one
10 moment to confer with my colleagues? I want to make sure I'm
11 not misunderstanding the Court's question and want to confer
12 with them about a specific issue.

13 THE COURT: Okay.

14 (Pause)

15 MS. MOE: Thank you, your Honor.

16 THE COURT: One moment, because I want to pull up this
17 portion of the government's briefing on this which triggered
18 these questions.

19 (Pause)

20 THE COURT: Okay, go ahead.

21 MS. MOE: Thank you, your Honor. As my colleagues
22 have pointed out to me, the definition of a victim for purposes
23 of the element of the statute and pursuant to the restitution
24 statute are different. And part of our hesitation in speaking
25 to issues of restitution is because that implicates the Crime

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1 Victims' Rights Act, so we want to confer with victims' counsel
2 on that issue as well before we reach a conclusion on that.

3 The definition set forth in the restitution statute,
4 which is 18 USC 3663(a)(2), for purposes of the section, the
5 term "victim" means a person directly and proximately harmed as
6 a result of the commission of an offense for which restitution
7 may be ordered.

8 So that's the particular issue that we just want to
9 think through before we reach a conclusion on in particular
10 because we're mindful of the Crime Victims' Rights Act. So I
11 apologize, it's not my intention, certainly, to fight the
12 hypothetical, we wanted to be thoughtful about that issue.

13 THE COURT: You will get me your views on that
14 question with respect to restitution, but as I understand your
15 initial point, for purposes, as you said, of the elements of
16 establishing any of the offenses, the government's view is that
17 this individual is not a victim in the sense -- granting that
18 restitution's definition of "victim" could be broader than
19 those for whom the government's proof of elements as to the
20 charged account would show to be victims, I think that's the
21 distinction you're trying to draw.

22 MS. MOE: Your Honor, our position is that we
23 recognize Minor Victim-3's testimony alone would not satisfy
24 the elements of the conspiracy count in which the overt acts
25 appear, our view is nonetheless that it's direct evidence.

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1 THE COURT: That's because the relevant age of consent
2 for purposes of the case that the government is trying to prove
3 is the New York statute, which sets 17 as the age of consent,
4 and this individual was -- sorry, under 17 is the age of
5 consent, and this individual, when the government understands
6 sexual conduct to have occurred, was 17, correct?

7 MS. MOE: That's correct, your Honor.

8 THE COURT: Okay.

9 MS. MOE: It's nonetheless our position this is direct
10 evidence for a number of reasons. First, it's --

11 THE COURT: Direct evidence of what?

12 MS. MOE: Of the charged conspiracy. In part because
13 this conduct occurred at the same time the defendant was
14 engaged in conduct with respect to the other victims, and her
15 testimony will establish a pattern that is corroborative of
16 their testimony and demonstrates the defendant's knowledge and
17 intent.

18 With respect to the issue --

19 THE COURT: You've slid between direct evidence and
20 404(b), right, knowledge and intent?

21 MS. MOE: No, your Honor. The government will
22 certainly be required to prove at trial the defendant's
23 knowledge and intent to commit these crimes. So the
24 defendant's conduct with respect to this victim goes directly
25 to that issue. In particular, I take the Court's point with

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1 respect to the issue of 17 or under 17, but more broadly, I
2 think the question at trial will be about, among other things,
3 the defendant's knowledge of Jeffrey Epstein's preference for
4 very young girls.

5 THE COURT: Well, let's say this individual were 20,
6 is it direct evidence of the crimes being charged?

7 MS. MOE: Yes, your Honor, but for a different reason.
8 Under those circumstances, it would nonetheless be our
9 position, even if the victim were 18, 19 or 20, that the
10 defendant's specific conduct towards that victim proves other
11 aspects of the course of conduct. In other words, the
12 particular pattern --

13 THE COURT: This seems to move into the email issue,
14 which I have excluded. That is to say, you wanted to put in
15 emails of the defendant setting up individuals with other
16 individuals over -- in some cases well over the age of consent,
17 and I have excluded that. So is there a basis for
18 distinguishing this here?

19 MS. MOE: Yes, your Honor, there certainly is for a
20 number of reasons. Here, the course of conduct is closely
21 intertwined. In other words, the defendant's interactions with
22 this victim closely mirror actions with other victims, for
23 example, introducing sexual topics in a slow and gradual way.

24 THE COURT: When you say "victim" there, do you mean
25 that in a legal sense? Because I still want to understand the

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1 point.

2 Now one might have all kinds of moral judgments and
3 concerns, but is there a legal sense in which the government
4 right now in talking to me is just identify the person, or is
5 there a legal sense in which you're proffering this individual
6 as an victim of the crimes charged, setting aside you don't
7 have an answer yet as to whether they may meet some basis for
8 restitution should the defendant be convicted.

9 MS. MOE: Yes, your Honor, I'm using that term both
10 for identification purposes and because I think, as the
11 victim's testimony will illustrate, she will describe a course
12 of unwanted conduct, and the way in which she came to engage in
13 that conduct is as a direct result of the defendant's behavior
14 in a way that closely mirrors the way the defendant secured
15 access for Mr. Epstein to the other minor victims in this case.

16 THE COURT: That is an argument about consent being
17 the basis for which -- we have put it aside to 412, but as a
18 general matter you have argued consent is irrelevant because
19 the age of consent is the only thing in issue for these
20 charges, but you're saying the relevance of this individual's
21 testimony turns on the government establishing nonconsensual
22 sexual conduct?

23 MS. MOE: No, your Honor, I'm simply explaining why we
24 are using that term "victim," because that's the way she
25 characterizes that experience, and I think that will come

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1 across when she describes it.

2 What I mean is not that the relevance turns on whether
3 or not she consented to that conduct, but the way in which that
4 occurred closely mirrors exactly how that occurred with other
5 victims. So in terms of proving the methods of the conspiracy,
6 the means they employed, the defendant's role in the
7 conspiracy, all of which is direct proof of the defendant's
8 guilt, this victim's testimony will be corroborative and
9 establish the defendant's knowledge.

10 THE COURT: You're saying that would be true
11 regardless of the age of this individual. I could keep doing a
12 hypothetical, 25, 30, it doesn't matter, from your perspective,
13 it would be relevant to establishing the conspiracy because it
14 occurred at the same time?

15 MS. MOE: Your Honor, I could see universe in which
16 there were an outer limit on the age a hypothetical victim
17 where this would be relevant. Our view is that the age of this
18 victim makes it particularly relevant, but it's the other
19 aspects of the course of conduct which are corroborative and
20 make this direct evidence. Here, this victim was 17, in close
21 proximity to the age of the other victims, and so her
22 testimony, among other things, establishes the defendant's
23 knowledge and awareness of a certain sexual preference for
24 girls under the age of 18.

25 THE COURT: But under the age of 18 is legally

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1 irrelevant to the crimes charged, correct? Under the age of 17
2 is what is legally relevant.

3 MS. MOE: That's certainly true with respect to the
4 elements as to the other victims, but I think as a matter of
5 common sense, a jury understanding that the defendant is
6 willing to provide Epstein with a girl at the age of 17 would
7 certainly speak to her knowledge of his sexual preferences.

8 THE COURT: Why doesn't it speak to a knowledge of
9 sexual preferences to someone just above the age of consent?

10 MS. MOE: Well, your Honor, I think the close
11 proximity of ages, it speaks to her knowledge about his
12 preference for very young girls.

13 I would also note that, although the age of 17 is
14 relevant with respect to the Mann Act counts, with respect to
15 the trafficking counts, the applicable age is there is 18.

16 THE COURT: I began this whole series by asking, like
17 eight times and very clearly, is there any sense in which this
18 individual, the conduct that's -- assuming it to all be true
19 with respect to this individual, could establish an element of
20 any of the crimes charged?

21 MS. MOE: Yes, your Honor. With respect to that
22 victim, that's certainly the case. But speaking to direct
23 evidence of knowledge and preferences, it's certainly also
24 direct evidence of the defendant's knowledge with respect to
25 the sex trafficking counts where the age of consent there is

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1 18. And so the fact that the defendant was taking these steps
2 towards a girl who was 17 years old certainly speaks to her
3 knowledge and willingness to provide such a girl to Epstein
4 with respect to the sex trafficking counts as well.

5 THE COURT: So to prove the sex trafficking count,
6 we're talking Count Five and Count Six, right?

7 MS. MOE: Yes, your Honor.

8 THE COURT: On this one, for sex trafficking, you have
9 to prove what with respect to H in order to get a conviction?

10 MS. MOE: That the victims were less than 18 years
11 old.

12 I would note on that score, your Honor, with respect
13 to the trafficking counts, the issue is about commercial sex
14 acts in exchange for something of value involving individuals
15 under 18. Minor Victim-3 would testify about participating in
16 sexualized massages with Epstein at the defendant's urging and
17 receiving compensation in part. And that's one of the many
18 other reasons why her testimony is corroborative of other
19 victim testimony in this case and direct evidence of the
20 charged crimes.

21 THE COURT: So the conduct took place -- the sexual
22 conduct took place at the age of 17. Factually, this is an
23 individual who says -- the government can't establish under the
24 age of 18 for purposes of travel. I guess that goes to the
25 Mann Act, not to the trafficking count.

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1 So on trafficking, the government would seek to have
2 this testimony as direct evidence with respect to the
3 trafficking count, because the individual of legal age in all
4 relevant jurisdictions was under the age of 18. You're going
5 to have to spell it out for me.

6 MS. MOE: Yes, your Honor. If the defense were to
7 argue that the defendant didn't know that victims with respect
8 to the trafficking count were under the age of 18 or wouldn't
9 have done this if they were under 18 or that she did not know
10 that Epstein had a preference for underage girls or his
11 sexualized massages were with girls under the age of 18, this
12 would certainly speak to that issue.

13 In particular, if the defendant were to argue that she
14 didn't know that the massages she was arranging were
15 sexualized, I think the testimony of the victim speaking to
16 that issue would certainly make that all the more relevant.

17 THE COURT: Right. Okay. I'm not sure the government
18 had previously argued this constituted direct evidence of the
19 trafficking count, is that right?

20 MS. MOE: Your Honor, I would have to review our
21 briefing. I believe we said that it was direct evidence of the
22 charged crimes. I apologize if we were vague about that, but
23 our view is the entire course of conduct speaks to the
24 defendant's role and knowledge, and the proof here is mutually
25 sufficient.

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1 THE COURT: Who am I hearing from on this one?

2 MR. EVERDELL: Me, your Honor. Thank you, your Honor.

3 I think your Honor hit it right on the head right from
4 the outset, which is if all we had were allegations related to
5 this particular individual, we would not have a charged crime
6 here because there was no criminal activity at all.

7 The only basis for which -- I think the government has
8 tried to articulate some basis for its relevance as direct
9 evidence of the charged crimes is her subjective experience of
10 what happened to her. She was of legal age in every single
11 jurisdiction where these events allegedly took place. So the
12 issue of consent, while we may have moral objections to this,
13 it was entirely legal and the government can't prove otherwise.
14 So all she's going to testify to, presumably, is how she felt
15 about those instances, and that is not proof that is probative
16 of the defendant's guilt of these charges.

17 Moreover, your Honor, it is quite inflammatory and
18 misleads the jury to hear when someone feels a certain way what
19 happened to her, even though legally it doesn't make a
20 difference, that is going to encourage them to feel sympathy
21 for her and convict the defendant potentially on a false ground
22 because there is no illegal conduct here.

23 Your Honor, I think the government has articulated or
24 at least tried to articulate at the Court's urging a basis why
25 this may be direct evidence of the sex trafficking conspiracy.

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1 That really was not spelled out in the briefing.

2 THE COURT: I think for sure it wasn't, because just
3 hearing it for the first time, it strikes me as having
4 potential plausibility. That was not present in the papers, so
5 I certainly will need briefing and to think about that question
6 more.

7 MR. EVERDELL: I can assure you if it had been really
8 teed up, I would have addressed it. But I would note that
9 there is a time difference between the Mann Act conspiracies
10 and the sex trafficking counts.

11 The sex trafficking counts are 2001 to 2004, and this
12 particular individual was well over the age of consent by the
13 time 2001 to 2004 is going on. She's alleging events that took
14 place in '94 and '95 when she's 17 and 18. 2001 to 2004 is
15 well past the age of consent in any of these relevant
16 jurisdictions.

17 I don't see how it is probative of the defendant's
18 intent -- when someone is presumably allegedly engaging in
19 perfectly legal sex acts, how that is probative of intent,
20 knowledge, or any of the above of a sex trafficking conspiracy.
21 And by the way, there's no allegation that she got paid, so how
22 are we talking about sex trafficking?

23 It seems like the government is trying to take an
24 episode of legal conduct and make it sound salacious for the
25 jury and use it as direct evidence of conspiracies for which it

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1 is entirely irrelevant, every single one of them.

2 So our view, Judge, is that her testimony should not
3 come in as direct evidence of the conspiracy. At best, what
4 the government has articulated -- they keep talking about
5 pattern, intent, knowledge. That's classic 404(b). So if
6 we're going to talk about this witness's testimony at all, we
7 should be talking about it in terms of 404(b) and whether it
8 meets that test. And it doesn't, your Honor. It is not
9 probative of knowledge or intent.

10 For a crime that charges causing someone to travel to
11 engage in a legal sex act as a minor, if that person is neither
12 a minor, did not travel with the intent of doing something
13 illegal because it was not illegal in any of those
14 jurisdictions, whatever happened, according to her own
15 testimony, it is not probative of any of those crimes and for
16 404(b) purposes, too.

17 Pattern, Judge, if it's modus operandi, that need to
18 be extremely specific before that can come in as modus operandi
19 evidence. We can't talk about engaging in social pleasantries
20 and polite conversation with someone as a pattern. That is not
21 a pattern that passes muster.

22 Furthermore, there are huge 403 issues with this
23 witness's testimony. If she talks about how she felt about
24 these experiences, that is eliciting sympathy from the jury.
25 It is not legally probative and it will lead them to think that

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1 she felt, in her words, sexually abused in these circumstances,
2 that she was in fact engaging in illegal conduct. And it
3 raises a real problem that the jury will convict on a false
4 premise, on a legally incorrect assumption that the conduct
5 that was occurring was illegal when it wasn't.

6 So your Honor, we object to her testimony for any
7 purpose at this trial.

8 MS. MOE: Thank you, your Honor. Just to taking those
9 points one by one, with respect to the time difference, we
10 think that it is nonetheless relevant with respect to the sex
11 trafficking counts.

12 THE COURT: Am I right -- point me to the page. It's
13 not argued in the papers.

14 MS. MOE: I apologize, your Honor, we should have been
15 more specific, and I do apologize about that. I do think that
16 the way we framed it was about preference for girls under the
17 age of 18 and about the course of conduct, but I apologize, we
18 should have been more specific about that.

19 But with respect to the timeframe and the course of
20 conduct, I think the jury would be free to conclude, based on
21 this direct evidence, that in 2002 and 2003 when Minor Victim-4
22 was being trafficked, that the defendant knew that Epstein had
23 a preference for girls under the age of 18 and knew that he
24 would engage in sexual contact with them because she knew in
25 1994 when she was involved in transporting Minor Victim-1 that

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1 she knew about that preference because of her conduct with
2 respect to Minor Victim-2 and with respect to Minor Victim-3.
3 That course of conduct continued throughout a decade and is
4 consistent. And I think the consistency of that is part of why
5 that is powerful proof of her knowledge and intent and why it's
6 direct evidence of the crimes charged.

7 With respect to the question of prejudice, the
8 government doesn't see any risk that this jury could convict on
9 this conduct for a number of reasons.

10 First, with respect to the concern that there's a risk
11 that the jury would convict based on this conduct alone, I
12 think we're confident that the Court's jury instructions will
13 explain to the jury what the elements of the charges in the
14 indictment are and what they aren't. And it's certainly the
15 case in many trials that there's evidence of lawful conduct
16 that is nonetheless offered as direct evidence of the charged
17 crimes. For example, if this were a case involving a Hobbs Act
18 robbery and there were evidence that on the morning of the
19 robbery the defendant bought a ski mask, that would be lawful
20 conduct but nonetheless offered as direct evidence of the
21 crimes charged, and it would be peculiar to either exclude that
22 evidence or introduce it with a limiting instruction that that
23 is lawful conduct to suggest that in some way the Court
24 endorses that conduct.

25 THE COURT: The hypo is interesting. If the ski mask

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1 is bought that day, it's direct evidence, if it's bought three
2 years earlier or three years later, at best it's 404(b)
3 evidence, not direct evidence.

4 MS. MOE: Well, here the pattern would be much
5 stronger, that the defendant participated -- again, to play out
6 the analogy -- in a robbery in 1994 involving ski masks, and
7 another robbery in 1995 involving ski masks, and again another
8 robbery in which the defendant bought ski masks, and then a
9 robbery years later in which the perpetrator was wearing a very
10 similar ski mask. That's the pattern here and why this is
11 direct evidence of the defendant's methods and her knowledge
12 and intent.

13 THE COURT: That's 404(b), evidence of methods, of MO.

14 MS. MOE: Here, your Honor, the government certainly
15 submits that this would otherwise be admissible under Rule
16 404(b), but here where the conduct is intertwined with the
17 conduct on trial, that it speaks to her knowledge about
18 preferences and the role that she played and the similarity,
19 and the fact this happened during the course of the charged
20 conspiracy the same time the defendant was involved in this
21 conduct with respect to other --

22 THE COURT: During the time of the Mann Act charged
23 conspiracy.

24 MS. MOE: That's correct, your Honor.

25 THE COURT: Not the trafficking charged conspiracy.

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1 MS. MOE: That's correct, your Honor.

2 THE COURT: So I need to get something in writing on
3 the trafficking count, because you haven't raised it directly
4 before and the defense hasn't had an opportunity to respond to
5 it before.

6 With respect to how this has been argued, I don't
7 think there's a basis to exclude entirely, but let me tell you
8 my thinking and I will hear a reaction to it.

9 The evidence related to alleged Victim-3, as the
10 government describes her, is not direct evidence of the
11 conspiracy charged in Counts One and Three of the indictment.
12 Counts One and Three charge the defendant with conspiracy to
13 entice minors to travel to engage in illegal sex acts and
14 conspiracy to transport minors with intent to engage in
15 criminal sexual activity.

16 The parties agree that alleged Victim-3 was 17 at the
17 time she was acquainted with the defendant and Epstein in
18 London, England where the age of consent is 16. Moreover, she
19 can't recall, and the government wouldn't be able to establish
20 that she was invited to travel with the defendant when she was
21 17 or 18. And because the alleged victim was over the age of
22 consent in all relevant jurisdictions and, therefore, any
23 alleged sexual activity was lawful, the alleged conduct does
24 not arise out of the same transactions or series of
25 transactions as the charged offense. It's not inextricably

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1 intertwined with the evidence, again with respect to the Mann
2 Act, and it's not necessary to complete the story of the crime
3 on trial, so I don't think it can be direct evidence of the
4 Mann Act counts.

5 There's a prejudice analysis that I will get to in a
6 moment, but as proffered, it strikes me the testimony may serve
7 a proper purpose under 404(b) as relevant testimony of the
8 defendant's knowledge, intent and alleged MO. For example, the
9 proffered testimony could tend to establish that the defendant
10 was aware of, for example, the sexualized nature of the alleged
11 massages. So if the argument is massages are not sexual or
12 there's no knowledge, this witness might have evidence and
13 testimony that could refute that point. The testimony could
14 support that the defendant asked the witness to recruit
15 underage girls to engage in similar sexualized massages which
16 tends to make the alleged MO more probable.

17 The testimony that this witness was allegedly groomed
18 by the defendant does not tend to establish the defendant's
19 knowledge, intent or MO to groom minor victims alone without
20 more, the kind of testimony I indicated, because this witness
21 was not a minor pursuant to the age of consent laws in any of
22 the relevant jurisdictions.

23 I will say I think there may be room for 404(b)
24 testimony, but there's a risk of a prejudice, the risk of
25 confusing issues and misleading the jury. A limiting

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1 instruction that makes clear that any alleged conduct was
2 lawful and cannot form the basis of a conviction in this case
3 certainly would be required to ensure that probative value is
4 not substantially outweighed by potential prejudice.

5 So that's my thinking. I'm going to need more from
6 the government on the anticipated testimony. I want to see a
7 proposed limiting instruction that would go to that, and I want
8 briefing on whether there might be a basis for direct evidence
9 as to the trafficking count.

10 So I will ask the government here for a submission
11 that outlines anticipated testimony that would be potentially
12 404(b) with respect to the Mann Act counts, as I've indicated,
13 a proposed limiting instruction in that regard, and to the
14 extent the government does have I think a not-yet-really-
15 thought-through argument about direct evidence as to the
16 trafficking act, I'm open to hearing it.

17 So let me look at the calendar. I will get briefing
18 from the government and then a response time from the defense.

19 Government by the 5th, defense response by the 10th.

20 Questions about that, Ms. Moe?

21 MS. MOE: No, your Honor, thank you.

22 THE COURT: Mr. Everdell?

23 MR. EVERDELL: No questions on this schedule or the
24 Court's direction. We would like to clarify one thing, which I
25 believe the Court said that the parties agree that this

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1 particular individual was 17. We agree that she alleges that
2 she was 17. It's quite possible, in fact likely, that she was
3 older than that, but I wanted to clarify that.

4 THE COURT: Fair enough. At least 17, the parties
5 agree. Thank you.

6 And I should say on that, Ms. Moe, I don't know if the
7 government anticipated putting in evidence about the sort of
8 subjective feelings of the individual. I can't say I see the
9 relevance in light of the fact of the legality of the conduct
10 here and my ruling, and certainly 403 prejudice would be a
11 concern. So if that is something that the government is still
12 contemplating, despite what I've indicated here, you'll have to
13 include briefing with respect to that.

14 MS. MOE: Yes, your Honor. My point was simply I
15 think it would be obvious based on the way that she presents
16 that this is a difficult thing to discuss, and so that was my
17 point on that issue. But I take the Court's point, if we were
18 intending to elicit any testimony about that, we would
19 certainly find that for the Court, particularly in light of the
20 Court's ruling.

21 THE COURT: You see the potential, given the legality
22 of the conduct with respect to this individual, that the sort
23 of feelings as to the immorality or wrongness or damage done to
24 this individual, all of which may be true, would have the
25 potential to prejudice the jury by convicting on a basis for

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1 which conviction the government has conceded would be
2 inappropriate, would be unlawful.

3 MS. MOE: I understand the Court's concern and we
4 certainly don't anticipate eliciting testimony about the
5 victim's conclusions about the event or suggesting that it was
6 unlawful or satisfied certain elements. My point was simply in
7 describing it, which would be difficult for Minor Victim-3,
8 that sort of her feelings about that or the circumstances that
9 that -- in narrating the facts of the event would I think come
10 to light at trial, but we certainly don't intend to elicit
11 testimony about conclusions, about things like consent or
12 whether it was lawful, and particularly in light of the Court's
13 ruling, and in any event, we wouldn't be seeking to proffer
14 legal conclusions from a witness.

15 THE COURT: Okay. Anything further on that, counsel?

16 MS. MOE: Not from the government, your Honor.

17 MR. EVERDELL: No, your Honor, thank you.

18 THE COURT: Defendant's 5 I think we determined is a
19 non-issue. This goes to evidence that the defense was
20 concerned in the government presenting regarding flight, and
21 the government has represented that it will not offer evidence
22 as to flight. Is that correct, Ms. Moe?

23 MS. MOE: Yes, your Honor.

24 THE COURT: Anything else we need to address here?

25 MR. EVERDELL: No, your Honor.

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1 THE COURT: Defendant's 6 is evidence of the
2 defendant's alleged false statements and regarding redacting
3 allegations related to the perjury counts in the indictment,
4 which I severed. The government has agreed not to introduce
5 evidence of these alleged false statements and agrees to the
6 proposed redaction.

7 Anything else that we need to address here, Ms. Moe?

8 MS. MOE: No, your Honor.

9 MR. EVERDELL: No, your Honor, thank you.

10 THE COURT: Thank you.

11 Defendant's 7 is Exhibit 52, which I think we have
12 addressed. Do we need to discuss that any further at this
13 point?

14 MS. MOE: Nothing further from the government, your
15 Honor, thank you.

16 MR. PAGLIUCA: Your Honor, I think we do need to
17 discuss this a little bit further.

18 The problem that we have on the defense side of this
19 is that the government says that we can establish a foundation
20 for this, but I'm quite frankly very skeptical about the
21 provenance of that foundation.

22 This is an exhibit that surfaces in 2009, and we don't
23 know how it surfaced. Assuming it was stolen by now deceased,
24 twice convicted felon Alfredo Rodriguez and sold to the
25 government, assume that for a moment, we don't know where it

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1 came from or how it was created.

2 The government says that it has a witness that is
3 going to say that that was Ms. Maxwell's book. I'm highly
4 suspect of that to begin with. And secondarily, that witness
5 wasn't around in 2004. And so we have now two witnesses for
6 this purported foundation, both of whom were not employed
7 during the relevant timeframe of the conspiracy. So I'm at a
8 loss, frankly, to understand how anyone could either
9 authenticate that document or admit it as some non-hearsay
10 document.

11 The government says well, even if it's not admissible,
12 then they will say as a business record -- the government says
13 we'll admit it for some other purpose, which I don't know what
14 that is. And if they're admitting it for another purpose, I
15 don't understand the relevance of this, given the inability to
16 establish a foundation and to tie it with any alleged conduct
17 that is part of the indictment in this case.

18 So I don't think we can just leave this here and then
19 have a discussion about this in the middle of trial. And it
20 seems to me that in this type of hearing, a pretrial hearing,
21 the government should say here's the witness that is going to
22 authenticate it, here's how they're going to authenticate it,
23 that is what we're authenticating it for, here are the pages
24 that we think are relevant and here's why.

25 We don't have anything of that information. We are

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1 left with: Yeah, we think we can admit this. Given this lack
2 of evidentiary foundation, I think we should address this issue
3 now.

4 MS. MOE: Thank you, your Honor.

5 With respect to the particulars in the exhibit, the
6 government has marked and produced to the defense excerpts from
7 that book that it intends to offer at trial. So the defense
8 knows the limited number of pages from that book that the
9 government intends to offer at trial.

10 THE COURT: What pages?

11 MS. MOE: Your Honor, I don't have the exhibit numbers
12 in front of me, but they're included in the subset that we
13 provided to the Court. I think there are about -- I don't want
14 to guess, but somewhere between four and six particular pages,
15 one in particular relating to victims in this case. So we are
16 happy to confer with the defense about those particular
17 exhibits and then raise those issues to the Court if there is
18 still confusion on that score.

19 With respect to the question of authentication, I
20 think the defense's argument confuses the question of chain of
21 custody with the question of authentication. I know the Second
22 Circuit has rejected essentially exactly the argument that the
23 defense is advancing here. For example, in a case of *United*
24 *States v. Al Farekh*, 810 F.App'x 21, (2d Cir. 2020), the
25 defense argued the government shouldn't be able to offer

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1 certain documents that were obtained by an FBI agent on a USB
2 drive, and the authentication testimony was about the
3 familiarity with the witnesses with things like handwriting on
4 the documents, their structure and the like. The same will be
5 true here.

6 And in that case, the Second Circuit said although the
7 government did not present evidence regarding the circumstances
8 surrounding the seizure of the USB drive, Federal Rule of
9 Evidence 901(b)(4) permits authentication based on the
10 appearance, contents, substance, internal patterns or other
11 distinctive characteristics of the items taken together with
12 all the circumstances. And the government submits that the
13 testimony at trial will satisfy all of the aspects of Rule 901

14 We're happy to submit additional briefing on this
15 during the trial, but in particular, given we don't intend to
16 offer any evidence from this book in our opening statement --

17 THE COURT: What is it going to be offered for?

18 MS. MOE: Your Honor, the evidence from that book will
19 be offered in particular related to the minor victims in this
20 case, so that's the relevance of those documents.

21 THE COURT: But why?

22 MS. MOE: It would be a page of that book that
23 contains contact information for several victims, including
24 their names, in a section marked "Massage" that includes the
25 names of -- I think it's exclusively female girls with

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1 parentheticals like "Mom" or "Parents," showing that the
2 contact number for the individuals in a section marked
3 "Massage" is for people's parents. That list includes some of
4 the minor victims in this case that the jury will learn about
5 in this trial.

6 THE COURT: It's not going to be talked about in
7 openings, but before in front of the jury this full
8 authentication process happens, I would like the government to
9 put out specifically what it intends to enter into evidence
10 with respect to this, and with specificity, who will provide
11 authentication and the proffer as to that testimony. And you
12 will deal with the timeframe questions that have been raised as
13 well.

14 MS. MOE: Certainly, your Honor.

15 THE COURT: I need to see a little bit more than
16 what's been suggested, and I need to have a better
17 understanding of what is potentially being offered for.

18 MS. MOE: Understood, your Honor, certainly.

19 THE COURT: So when would you like to do that?

20 MS. MOE: Your Honor, may I confer with my colleagues?

21 THE COURT: Sure.

22 (Pause)

23 MS. MOE: Thank you, your Honor. Could we possibly
24 submit it on November 10, along with other briefing that date?

25 THE COURT: That's fine.

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1 MR. PAGLIUCA: That's fine, your Honor.

2 THE COURT: Respond in the same timeframe.

3 MR. PAGLIUCA: Understood.

4 THE COURT: Defendant's 8 is the search, the El Brillo
5 Way search. The defendant seeks to prohibit the introduction
6 of any items seized during an October 2000 search of Jeffrey
7 Epstein's Palm Beach residence.

8 The defense raises concerns, including how and where
9 the evidence was maintained, the lack of authenticating
10 witnesses and the lack of relevance to the charges against
11 Ms. Maxwell. Here, again, the government states that it
12 intends to call witnesses to establish the authenticity of the
13 evidence.

14 So how do we take this up now, Ms. Moe?

15 MS. MOE: Yes, your Honor. The government submits
16 that at trial law enforcement witnesses will discuss the search
17 and lay a foundation for the admission of this evidence.

18 THE COURT: So as to authentication, you have
19 witnesses that did exactly what with respect to the search?

20 MS. MOE: They were personally involved in the search.

21 THE COURT: Okay. So they will describe the process
22 by which they engaged in the search and the evidence that they
23 obtained and how it was maintained and the like.

24 MS. MOE: Yes, your Honor.

25 THE COURT: And the relevance of the search result

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1 evidence is what?

2 MS. MOE: Your Honor, a number of exhibits were seized
3 from that residence and there are a number of marked
4 photographs from the interior of that residence which are
5 relevant both to give context to the jury about what the
6 interior looked like but in particular about certain
7 decorations in the residence that are both consistent with what
8 witnesses will describe but also illustrate for the jury the
9 number of, for example, nude images in the house and otherwise
10 that give context to sort of the knowledge that certain people
11 would have while inside the house. I think all that will be
12 corroborative of witness testimony and, for the same reasons,
13 certain items seized from the residence will be as well. For
14 example, a massage table was seized from that residence and is
15 marked as a government exhibit.

16 THE COURT: Okay. Who is taking this one?

17 MR. PAGLIUCA: This would be me, your Honor. Again,
18 this is very, I suppose, aspirational by the government that
19 they can lay these foundations.

20 THE COURT: This sounds like pretty standard stuff.
21 Law enforcement had a search warrant, engaged in a search, this
22 is what they found, here's how they marked it, here it is.

23 MR. PAGLIUCA: The affiant who conducted the search
24 and who took the items into evidence is deceased. There are, I
25 believe, two officers who participated in the search, but in a

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1 discrete fashion, and I believe they do not have knowledge
2 about what the other officers did or didn't do as part of that
3 search. So what we end up with is this piecemeal approach of:
4 I was over here and did this, somebody over there did that, but
5 I can't put it all together for you 20 years after the fact.

6 And look, I understand if they have a witness who
7 could say I was there, I saw this, I can authenticate, that's
8 fine. I don't have a problem with that. But again, they
9 haven't identified that witness or what pieces of this that
10 witness is going to talk about. So that's problem number one.

11 Problem number two is the timing of this. This is an
12 October 2005 search where they seized items that they're trying
13 to now relate back to a 1994 to 2004 timeframe. What that
14 table has to do with 1994, I don't know. 2004, I don't know.
15 Whether it was there in 2004, we don't know. All we know is
16 that in a moment in time, in October 2005, someone says these
17 items were seized and that ends up on a search warrant
18 inventory from a deceased detective that doesn't have any
19 foundation to it. That's my problem, your Honor.

20 And there may be discrete pieces of evidence that a
21 certain witness might be able to identify, but I think we're
22 just short shrifting the whole evidentiary process here with
23 these proffers where they're saying we can do it, and I'm not
24 convinced they can.

25 THE COURT: We're not short shrifting because it

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1 hasn't happened yet. What you're making are cross points.

2 Ms. Moe, obviously you're dealing with a time
3 question, and it sounds like one of the primary investigators
4 or law enforcement who engaged in the search is deceased. So
5 what's the proffer to the Court as to what specifically the
6 government will do to authenticate these items?

7 MS. MOE: Yes, your Honor. On this score, I would
8 note there is a difference, certainly, between authentication
9 and chain of custody. With respect to authentication, law
10 enforcement witnesses who personally participated in the search
11 will describe what they observed in the search and how they --

12 THE COURT: The government's proffer to the Court is
13 that even though one of the law enforcement relevant here is
14 deceased, that you have other law enforcement who have personal
15 knowledge of these items being found where they were and seized
16 when they were, et cetera?

17 MS. MOE: Yes, your Honor. I additionally note that
18 the search was video recorded, that video has been produced to
19 the defense, and so some of these items also appear on the
20 video walk through of that search. And so our view is that
21 their direct testimony about their experiences in the search
22 satisfies our obligations with respect to authenticity.

23 THE COURT: I'm not going to prohibit this in limine,
24 but questions remain as to the government's ability to
25 authenticate the items, and there will be an opportunity for

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1 the defense to engage in the full set of questions that counsel
2 has indicated, but for purposes of the in limine motion, it's
3 denied.

4 Defense 19. Here, the defense seeks to suppress
5 alleged Victim-4's identification of Ms. Maxwell on the ground
6 that the government used unduly suggestive photo array
7 procedures that violate due process rights.

8 I am prepared to deny this motion. Eyewitness
9 identifications should be excluded when improper police conduct
10 created a substantial likelihood of misidentification. *Perry*
11 *v. New Hampshire*, 565 U.S. 228, (2012).

12 I follow a two-step analysis in ruling on the
13 admissibility of identification evidence. First, I must
14 determine whether the pretrial identification procedures were
15 unduly suggestive. Some examples of suggestive procedures
16 include using a very small number of photographs, making
17 suggestive comments, or the display of the accused in a way
18 that so stood out from all other photographs to suggest to an
19 identifying eyewitness that the person was more likely to be
20 the culprit. See, *United States v. Concepcion*, 983 F.2d 369,
21 (2d Cir. 1992).

22 Looking at the photo array, neither the photos used or
23 the procedure itself was unduly suggestive. The array
24 contained a sufficient number of photos larger than many arrays
25 that courts have held were not unduly suggestive. Defense's

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1 argument that the Ms. Maxwell's photo looks like a mugshot and
2 is different from the others doesn't persuade me here. Alleged
3 Victim-4 identified at least one other photo in the array that
4 she thought could be Ms. Maxwell but she ultimately chose
5 Ms. Maxwell's photo, and there were several photos in the array
6 that were of roughly the same quality and angle as
7 Ms. Maxwell's photo.

8 The defense fails to identify any suggestive comments
9 made during the identification that would deem the procedures
10 unduly suggestive. The government appears to have asked
11 whether the individual recognized anyone in the book. So I
12 conclude the identification procedure was not unduly
13 suggestive.

14 Even assuming the photo array was unduly suggestive,
15 the identification here had independent reliability factors I
16 must consider under the totality of circumstances that include
17 the opportunity of the witness to view the individual at the
18 time of the alleged crime, the witness's degree of attention,
19 the accuracy of the the witness's prior description of the
20 individual, the level of uncertainty demonstrated, the length
21 of time between the alleged crime and the confrontation. See,
22 *Neil v. Biggers*, 409 U.S. 188, (1972).

23 Here, the alleged Victim-4 had the opportunity to view
24 Ms. Maxwell. They interacted several times over the span of
25 years. As the government points out, the alleged interactions

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1 with Ms. Maxwell make the alleged victim's identification more
2 accurate than other instances where identification has been
3 deemed admissible, like when a witness saw the defendant in the
4 distance under street-lit illumination and was familiar with
5 the individual seeing them in the neighborhood.

6 (Continued on next page)

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1 THE COURT: (Continuing)

2 The government also correctly notes that the delay in
3 time between the alleged misconduct and identification is not
4 determinative because of the frequency of interactions between
5 the alleged individual and Ms. Maxwell. Alleged Victim 4 was
6 able to identify Ms. Maxwell when she got to the photo in the
7 array with little hesitation. The argument that -- I will
8 leave it at that.

9 The defense requested an evidentiary hearing on this
10 issue but I don't see facts put forward by the defense that
11 puts, in genuine dispute, any facts that would support
12 suppression of the identification so there would be nothing
13 gained from an evidentiary rehearing, see *United States v.*
14 *Brown*, 784 F. App'x 1 (2d Cir. 2019) so the request is denied.

15 Defense 10. Expert testimony by law enforcement
16 officers which the defense moves to exclude and the government
17 has noticed intent to call three law enforcement officers as
18 fact witnesses but not as experts. The government represents
19 that it will not elicit expert testimony from any of them.

20 So, the law enforcement officers can testify as fact
21 witnesses to the facts that they personally perceived but not
22 provide testimony that summarizes parts of the investigation
23 which the officer did not personally experience and may not
24 provide testimony that relies on specialized training and
25 experience. The government's example of a law enforcement

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1 officer testifying as to what the officer himself found and
2 participated in while executing a search seems to me
3 permissible fact testimony.

4 Anything to take up here from the defense,
5 Ms. Menninger?

6 MS. MENNINGER: No, your Honor. Thank you.

7 THE COURT: Ms. Moe?

8 MS. MOE: No, your Honor. Thank you.

9 THE COURT: Defense 11 is anticipated testimony
10 regarding an alleged rape by Jeffrey Epstein. Let me ask the
11 government to explain what it intends to do with respect to
12 this and for what purpose the testimony would be sought to be
13 introduced.

14 MS. MOE: Certainly, your Honor.

15 As a threshold matter, your Honor, I would note that
16 there is an overlap here between the arguments in the
17 defendant's motion *in limine* and the 412 motion. I think one
18 motion seeks to introduce some of this evidence but
19 characterize it as consensual and the other motion seeks to
20 preclude it, reference it to be non-consensual. And so, I
21 would be happy to address that now, but it may be easier to
22 address that issue in the context of the 412 briefing.

23 THE COURT: Counsel, do you agree?

24 MR. EVERDELL: Your Honor, we can wait until the 412
25 briefing.

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1 THE COURT: So to the extent there is overlap in these
2 issues, it's best to take it up in the 412 proceeding so that
3 we can discuss the issues without violating that rule.

4 Defendant's 13. This is a motion to preclude the
5 admission of several exhibits. I'm going to grant the motion
6 with respect to Exhibit 251 and 288. Based on the briefing
7 before me, 401 relevance is minimal, at best, and outweighed by
8 403 prejudice. 294, so some of the same questions around the
9 authentication issue so I think that ruling holds. I won't
10 otherwise preclude this evidence. It is potentially
11 corroborative evidence of testimony and 403 prejudice does not
12 rule out 401 but the defense can maintain the search and
13 authentication issues that we have discussed.

14 Exhibit 403 I won't preclude, it's potentially
15 probative of the relationship between the defendant and
16 Mr. Epstein. The government proffers that it will corroborate
17 and that the photo would corroborate anticipated witness
18 testimony and I don't -- so, there is 401 relevance and not
19 substantially outweighed by any 403 prejudice.

20 On this last one I may have said the wrong number. I
21 had 403 on mine. So, Exhibit 313 is the photograph that I have
22 indicated I am not excluding, it is potentially probative of
23 the relationship between the defendant and Mr. Epstein and not
24 outweighed by prejudice.

25 And then 606, this is the issue on authentication and

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1 hearsay grounds that I have already indicated I'm going to have
2 the parties address further, correct?

3 MR. PAGLIUCA: Yes, your Honor.

4 THE COURT: All right.

5 Any questions about any of those rulings?

6 MS. MOE: Not from the government, your Honor. Thank
7 you.

8 MR. PAGLIUCA: No, your Honor. Thank you.

9 THE COURT: And about the time frames I have set on
10 the different pieces that I require briefing on after everybody
11 has. And, you will get the transcript.

12 MS. MOE: Understood, your Honor. Thank you.

13 THE COURT: All right.

14 With that, I think we can pick up some outstanding
15 logistics issues and I will hear from counsel as to any issues
16 they want to raise.

17 So, we begin our questionnaire process on Thursday.
18 The government -- my chambers will produce the copies as an
19 original matter. The government will take the completed copies
20 from the jury department -- the completed questionnaires with
21 no identifying information and make copies for the defense and
22 for the Court. My request is to give both a paper copy and an
23 electronic copy. I think that will aid everybody's use of the
24 document since we have got multiple people looking at them, and
25 then of course return the originals to the Court.

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1 Any questions from the government on its obligations
2 there?

3 MS. MOE: No, your Honor. Thank you.

4 THE COURT: The video remarks, at our last conference,
5 as we discussed, my plan is to video record the preliminary
6 instructions to be played for each panel before the
7 questionnaire. I sent the parties my script and there were no
8 objections. I'm actually going to record that tomorrow. I
9 just want, does either party request to see the video before
10 it's played for the prospective jurors on Thursday? Obviously
11 I'm going to record it exactly as stated in the script.

12 MS. MOE: No, your Honor.

13 MS. STERNHEIM: Judge, unless you are wearing some
14 funky t-shirt, no.

15 THE COURT: It's just a robe. Thank you.

16 Just in thinking ahead to the voir dire process, I
17 have preliminary instructions that I'm drafting that I will
18 give to each panel before they are individually brought in for
19 the voir dire. Thinking ahead again, just for time-saving
20 purposes, what I propose is we do another video of that so that
21 it is played for each panel -- there is a morning panel and
22 afternoon panel. And the logistics of all of this is
23 complicated. So, what I propose I will send out, again, my
24 script, let me know if you have any comments or objections, and
25 once we all agree I will record it so that the jury staff can

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1 just play it once each panel is assembled.

2 Any concerns with that, Ms. Moe?

3 MS. MOE: No, your Honor. Thank you.

4 THE COURT: Ms. Sternheim?

5 MS. STERNHEIM: No.

6 THE COURT: I think what I am also going to do, we
7 haven't talked through the specifics of the logistics of the
8 voir dire days -- I think I did generally -- but we are going
9 to have a morning panel, the jurors are going to come in to a
10 courtroom which is sort of the holding courtroom. The
11 preliminary instructions will be played and then we bring them
12 in one at a time. The afternoon panel is going to assemble
13 somewhere else so there is no overlap, they'll be played the
14 instructions. Once we are finished with the morning panel,
15 they'll be brought in and the like.

16 We will do the individual voir dire, obviously if
17 anyone is struck for cause following that they'll be excused.
18 Those who are not struck for cause, what I propose is that we
19 give them an instruction sheet that tells them where and when
20 they're returning for the final stage of the process and remind
21 them the basic instructions about media restrictions and the
22 like just so they have that and they take it with them. Of
23 course I would show you what I am thinking before we do it but
24 that basic idea.

25 I want to see if anybody has any concerns or

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1 objections.

2 MS. MOE: No, your Honor. Thank you.

3 MS. STERNHEIM: No objection.

4 THE COURT: I do think once we do that, the non-struck
5 jurors, with that information, can then be excused for the day
6 and returning on -- and obviously I haven't indicated yet --
7 the 19th or the 29th, those instructions. But they don't need
8 to sit around for the rest of the day while we do the other
9 individuals.

10 Any objections to that process, Ms. Moe?

11 MS. MOE: No. Thank you.

12 THE COURT: Ms. Sternheim?

13 MS. STERNHEIM: No, thank you.

14 THE COURT: There are logistical issues we are dealing
15 with for bringing the full panel back for the exercised
16 peremptories as well as setting up the courtroom with
17 distancing issues which turns, to some extent, on the vaccine
18 status of the individuals because we have different spacing
19 requirements under the current protocols for the vaccinated
20 versus unvaccinated. Now, the parties have proposed that I ask
21 that question in voir dire and I rejected that because I don't
22 think there is any proper basis for striking based on
23 vaccination status. But what I would propose, in order to
24 facilitate the Court's logistical process which is complicated,
25 is that for our non-struck jurors, as we give them the

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1 instruction, they're handed a sheet of paper which says write
2 your juror number and check a box, vaccinated, not vaccinated,
3 I don't want to say, and the Court gets that but not the
4 parties. And that way we can set up the courtroom, we can
5 figure out where we are going to put everybody for peremptories
6 and the like.

7 Ms. Moe?

8 MS. MOE: The government has no objection to that,
9 your Honor.

10 MS. STERNHEIM: No objection.

11 THE COURT: I do think we are going to do the
12 peremptories on the 29th, as I have indicated. We are still
13 working through the logistics. This piece helps. As I said,
14 there are pros and cons to both, but I think that the safest
15 course for proceeding with a full jury is to bring them back on
16 the 29th -- I will give you my final resolution as to that when
17 I have it -- but my thinking is we are in the courtroom, all of
18 us. The panel, approximately 50 to 60 people who I will bring
19 back are in two other courtrooms because we can't get them all
20 in one place, with a video, in which I ask some very
21 preliminary questions: Does anybody need to change any answers
22 and has anybody had media exposure, etc. Hands raised. If
23 anybody does raise their hands, we will have staff in each of
24 those rooms who we can bring in one at a time to deal with.
25 And assuming not, or once we deal with that, that's our panel,

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1 the parties exercise the peremptories by list, and we are done.

2 So, as I say, I am still working through the specific
3 logistics of that but that's my thinking as to how we will do
4 it.

5 Any reactions, Ms. Moe?

6 MS. MOE: No, your Honor. Thank you.

7 THE COURT: Ms. Sternheim?

8 MS. STERNHEIM: Yes. My only reaction is are we going
9 to be able to see the jurors as they respond to the Court's
10 questioning?

11 THE COURT: So, I think what we can do is have staff
12 in each of the courtrooms, I will ask my question, anyone who
13 raises their hand will be brought in individually. If you
14 would like to have someone in each of those rooms for the
15 hand-raising, that's fine with me.

16 MS. STERNHEIM: OK.

17 THE COURT: We would be happy to do that.

18 MS. STERNHEIM: Thank you.

19 THE COURT: But because there are other trials being
20 selected on the 29th we can't use the jury assembly room and,
21 in any event, it would slow us down. So I think this is the
22 way to go logically but that's what it will entail for the
23 exercised peremptories.

24 MS. STERNHEIM: Thank you.

25 THE COURT: One of the obstacles to the jury selection

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1 here is length of trial and the timing of trial. I would like
2 the parties, in light of -- you have gotten some rulings,
3 obviously not everything yet -- to think about whether what we
4 include in the questionnaire is still the six-week time frame
5 that we have indicated. And if it is, it is, but if there is
6 any basis to suggest a lower estimate as the parties have
7 continued preparing their cases and in light of any rulings, I
8 would certainly be open to hearing it if we could safely put a
9 shorter time frame in the questionnaire. Again, maybe we
10 can't. So I just ask you to think about it and confer and put
11 in a letter by November 2nd, on ECF, indicating whether the
12 parties agree that there should be any different estimate to
13 the trial length than what we have indicated in the current
14 draft of the questionnaire. I recognize that may change after
15 that but for jury selection purposes it won't help us if a few
16 days later we decide that we could say four weeks instead of
17 six weeks. So you will let me know and I will ask the parties
18 to confer. You don't need to put in specific reasons, just if
19 you can put in a joint submission as to the parties' best
20 overall estimate of length of trial is to see if it can be
21 realistically any shorter than what is in the questionnaire to
22 help facilitate jury selection.

23 That's what I have. I will hear from counsel any
24 other issues. Ms. Moe?

25 MS. MOE: Yes, your Honor; very briefly on two

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1 administrative items.

2 First, it is the practice in this district to place on
3 the record at a final pretrial conference the status of plea
4 discussions and so I just wanted to place on the record --

5 THE COURT: I guess I hadn't assumed this is our final
6 pretrial conference and I do usually do that, but there is no
7 point in not at least doing that now in case we don't get
8 together again, which seems unlikely. But, go ahead.

9 MS. MOE: Yes, your Honor; for that reason we wanted
10 to place on the record that the government has not issued any
11 plea offers to the defense and the defense has not requested
12 any plea offers from the government, and we would respectfully
13 request that the Court confer with the defendant that that is
14 accurate.

15 THE COURT: OK. Ms. Sternheim?

16 MS. STERNHEIM: Do you want to hear from me?

17 THE COURT: I will hear from you first and then I will
18 ask Ms. Maxwell.

19 MS. STERNHEIM: That is correct. We take the position
20 that our client has not committed a crime so plea bargaining
21 was not an issue.

22 THE COURT: Ms. Maxwell, what Ms. Sternheim indicated
23 is accurate and correct?

24 THE DEFENDANT: I have not committed any crime and --

25 THE COURT: And what Ms. Sternheim indicated is

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1 accurate?

2 THE DEFENDANT: Oh sorry. Yes, your Honor.

3 THE COURT: Anything else on that, Ms. Moe?

4 MS. MOE: No, your Honor. Thank you.

5 Just with respect to the second administrative item,
6 the government has received the Court's order related to the
7 Daubert hearing. Because the defense's Daubert briefing was
8 focused on the question of grooming it would be helpful to
9 understand the scope of the hearing and, in particular, whether
10 the Court would like the government to present evidence with
11 respect to the full scope of the expert's findings and
12 conclusions that were addressed in the motions or whether the
13 hearing would be focused on the question of grooming.

14 THE COURT: I guess I think it goes to each of the
15 proffered opinions being offered --

16 MS. MOE: Thank you, your Honor.

17 THE COURT: -- in part because of overlap in those
18 issues. I don't know that it's obvious to me how to separate
19 them out at this point.

20 MS. MOE: Thank you, your Honor. It is very helpful
21 to know in advance of the hearing.

22 THE COURT: Ms. Sternheim, anything on that?

23 MS. STERNHEIM: Yes, Judge.

24 These, I guess you put them under the housekeeping
25 category and I know tomorrow the government is to respond to a

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1 letter that I raised concerning legal mail, but we still have
2 the issue that Ms. Maxwell has not received trial-related
3 discovery that is imperative for her to review to consult with
4 counsel. It also has bearing on some of the issues --

5 THE COURT: What hasn't been received?

6 MS. STERNHEIM: Recent disclosures that the government
7 has made, she still has not received some of them. They're
8 sent by the government to the MDC.

9 THE COURT: Yes. But, specifically, what are you
10 talking about?

11 MS. STERNHEIM: 3500 material that we -- counsel
12 received electronically the other day.

13 THE COURT: And by the other day what do you mean,
14 Ms. Sternheim?

15 MS. STERNHEIM: It was Monday, Judge. She has still
16 not received the production made by the government which I
17 believe they send via federal express.

18 THE COURT: So, Ms. Moe, the government made a 3500
19 production a week ago?

20 MS. MOE: Your Honor, the government has been
21 supplementing its 3500 productions on a rolling basis. I don't
22 recall the exact date but we have been supplementing them and
23 have made productions last week.

24 THE COURT: And do you know why -- the representation
25 is a production made a week ago has not made its way to

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1 Ms. Maxwell. Do you know anything about that?

2 MS. MOE: Your Honor if I could have one moment?

3 THE COURT: Sure.

4 MS. MOE: Thank you.

5 (Counsel conferring)

6 MS. MOE: Your Honor, I don't have particular
7 information about the series of disclosures we made last week
8 and whether or not they've been processed by the MDC but we
9 will certainly be conferring with the MDC in connection with a
10 response to the defense's letter on Friday. Our understanding
11 is that, generally, that drives have been received by MDC,
12 processed through their warehouse, picked up by legal counsel
13 and produced to the defense in regular time frame. I can't
14 speak to any particular package that was mailed last week
15 because I am hearing about it now for the first time.

16 THE COURT: Well, OK. You will include in your
17 letter -- I mean, I think at this point a week is too long. I
18 think the representation in the prior letter was one to two
19 days for legal mail, maybe this is different because this is
20 different?

21 MS. MOE: I don't believe so, your Honor. Part of the
22 reason why I want to look into this and confer with my
23 colleague is we are not quite sure whether the date was Monday
24 or Wednesday that we produced this material to the defense and
25 we want to just double-check the mailing date to make sure we

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1 have all our facts straight about the exact timeline. So I am
2 happy to address that in the letter.

3 THE COURT: Yes, do address that in the letter.

4 Is there anything the government can do -- you know,
5 there is going to be some time built in for the facilities
6 screening process and it getting to the defendant. Obviously
7 there are other individuals in the same situation pretrial,
8 heading into trial, and there are a lot of inmates, but -- so
9 you will address what's happening on the institution side in
10 the letter.

11 What can the government do to facilitate the process
12 going forward?

13 MS. MOE: Your Honor, we have been trying to produce
14 materials as quickly as possible. We have been FedExing those
15 materials promptly to the facility. When we do so, we notify
16 the facility that, in particular, a disclosure for this
17 defendant is in-bound to the facility so that legal counsel
18 knows about it and can keep an eye out for it which I think is
19 unusual but we are happy to continue to take that step in this
20 case.

21 My understanding is that materials have been received
22 by the defendant at the facility. We will continue to check on
23 that issue. I would note that our rolling productions are
24 going to be frequent but also small as we continue to meet with
25 witnesses and produce small amounts of rolling materials. I

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1 think the defense is well equipped to print those materials and
2 meet with the defendant in person about it as they have been
3 doing. They can certainly discuss those documents in the video
4 conferences that they're having with the defendant. Our
5 understanding is that this defense team has a large amount of
6 access to video conferencing sessions with this defendant and
7 so when the defense receives those materials, they're certainly
8 free to review those with the defendant in real-time in their
9 sessions.

10 And so, we are taking every step that we can to ensure
11 that the defense and the defendant have those materials but we
12 think those steps are all that is required here and certainly
13 more than is necessary to make sure the defendant is apprised
14 of those materials in anticipation of trial.

15 THE COURT: As to the steps, if you have a new
16 submission we are talking about newly produced 3500 material,
17 limited volume; correct, Ms. Moe?

18 MS. MOE: Yes, your Honor.

19 THE COURT: And you are going to send that by FedEx --
20 so overnight -- to the facility in each instance, correct?

21 MS. MOE: Yes, your Honor.

22 THE COURT: And you alert BOP counsel, MDC Legal
23 counsel that something is coming for Ms. Maxwell so they can be
24 on alert. Do you get indication back from legal counsel that
25 it's been received and delivered?

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1 MS. MOE: No, your Honor. We have not been asking to
2 do that mindful of their obligations towards all of the other
3 inmates at the facility but we appreciate the steps they have
4 taken to be responsive to our alerts and about the defense's
5 requests. For example, in some instances I think the defense
6 has been e-mailing legal counsel noting certain tracking
7 numbers and asking them to check at the particular warehouse.
8 So that process seems to be working. I don't think we can
9 create a system where the defendant is receiving, in jail, on a
10 24-hour basis, all disclosures. I don't think that is
11 practical but I think especially because, in some instances, we
12 may be uploading to the defense through a file sharing program
13 certain disclosures on one day and they may be meeting with the
14 defendant in person the very next day, they certainly have the
15 ability to talk about those materials with the defendant, to
16 provide her with paper copies if they wish, and I think that is
17 more than sufficient.

18 THE COURT: Well, you are not suggesting that instead
19 of government sending the materials to the facility and working
20 with the facility to facilitate timely movement of the
21 materials to Ms. Maxwell, are you?

22 MS. MOE: Of course, your Honor.

23 Our view is in combination of the fact that, in the
24 short-term, the defense has the opportunity to talk to the
25 defendant immediately about it if they wish to, and in longer

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1 term the defendant will have those materials in a reasonable
2 time frame. I think in combination with those efforts, that's
3 sufficient.

4 THE COURT: So in your letter tomorrow you will
5 indicate your understanding of the time frame including the
6 specific 3500 material sent last week because, again, the
7 representation I have is that you sent it to the defense on
8 Monday and we are here a week later and Ms. Maxwell hasn't
9 received it. You will find out what the story is with that and
10 inquire as to whether there are any additional steps that can
11 be taken in light of where we are in advance of trial to
12 further facilitate the speedy transmission of the materials to
13 Ms. Maxwell.

14 MS. MOE: Yes, your Honor.

15 THE COURT: Ms. Sternheim?

16 MS. STERNHEIM: Judge, the procedure is such that even
17 if I were to hand-deliver it myself she would not get it. If
18 the government hand delivers it, she will get it. And we have
19 requested that if they are going to do late-breaking
20 disclosures, given that we are within weeks now of trial, that
21 it be hand-delivered with a call to the MDC legal department to
22 facilitate that.

23 I can't just give her papers. As the Court well
24 knows, even when I put them in the legal mail box, there is an
25 issue as to when she gets that. And I know the government will

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1 respond to those issues tomorrow. But this is an issue -- and
2 I will give the government the benefit of the doubt -- they do
3 not know what we do when we have a conference with Ms. Maxwell
4 so to assume what we are doing is erroneous. But, I will
5 complete that topic and move on to another one.

6 THE COURT: I want to understand the specific
7 suggestion.

8 So, presumably now, on a daily basis, the government
9 may be meeting with witnesses and taking notes. I mean, I get
10 those notes, an additional 3500 material during trial, it is
11 one or two pages of chicken scratch, handwriting. So your
12 proposal is that every day that one of those is produced it's
13 hand delivered to the MDC by government staff?

14 MS. STERNHEIM: That would be ideal but I'm not asking
15 that and I don't think it comes that way, I think it comes more
16 in these clumps. I'm not asking for every single page to be
17 hand-delivered but if they know they are making a substantial
18 production, that should be hand-delivered.

19 THE COURT: And what do you mean by substantial? Over
20 a hundred pages? What are we talking about?

21 MS. STERNHEIM: Look. You know, it is not the
22 quantity, it is what is in it that may have significance here.

23 THE COURT: Ms. Sternheim, you have to be realistic on
24 this.

25 MS. STERNHEIM: I'm trying to be.

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1 THE COURT: I mean, you have made a lot of this noise
2 about not having received it, not having received it in time.
3 I am asking for a specific request that's realistic.

4 MS. STERNHEIM: Every day I would like whatever
5 they're producing to be hand-delivered.

6 THE COURT: Well, I deny that request.

7 MS. STERNHEIM: I understand that. That's why I
8 didn't raise it but I think there needs to be some mechanism
9 either if a FedEx comes to the facility that it be
10 speed-delivered to Ms. Maxwell. Boxes of legal materials that
11 have been sent to her, when we follow the tracking, they are
12 left in a facility, they're not being picked up.

13 I am not privy to what the mail operation is there.
14 Perhaps the government can get some insight.

15 THE COURT: When you say they're not being picked up
16 you are saying that there are some that she has never received?
17 You are saying she is not receiving it in the one to two to
18 three-day time frame that you are asking for.

19 MS. STERNHEIM: I submitted a letter to the Court the
20 other day. In it there were four indications of items that
21 were available for pickup. When I alerted the MDC to that,
22 after the second request on Friday, they sent me back
23 something, *We are going to go pick them up.* I shouldn't have
24 to push them to go to the post office. I can't deliver the
25 stuff myself because it's not going to be given to her. So you

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1 do it through the United States post office, I don't know what
2 the situation is how the MDC receives its packages, but if the
3 tracking information says available for pick up and days go by
4 and it's not picked up, what am I to do to put a candle under
5 the MDC to get those packages?

6 THE COURT: I guess I'm still trying to understand
7 what it is that you are asking the Court to do.

8 MS. STERNHEIM: I'm asking the Court to have the MDC
9 retrieve its mail in a timely manner. I will notify them if a
10 next-day delivery is on the way, and that it be picked up for
11 next-day and not languish in the post office.

12 THE COURT: Ms. Moe?

13 MS. MOE: Your Honor, we will confer with MDC legal
14 about this issue and their practices and happy to provide the
15 Court with additional information about our disclosures last
16 week and the ongoing practices.

17 I can't speak to the particular mail sorting practices
18 of the MDC, but I want to assure the Court we have been working
19 diligently with the defense and with MDC legal on this issue
20 and have been taking extraordinary efforts to make sure the
21 disclosures are produced promptly and that they're sent to the
22 defendant quickly and we will continue to do so. And if we
23 learn of a practical way of expediting this, we would certainly
24 be open to exploring that but that's all the information that I
25 have at this point.

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1 THE COURT: Thank you.

2 Can I ask the government, if you have a substantial
3 production, let's say over 50 pages of documents to review, can
4 the government have those hand-delivered to the facility?

5 MS. MOE: No, your Honor.

6 Respectfully, that is extremely resource intensive, it
7 requires asking either a member of the prosecution team or
8 their colleagues who are also working on cases to, instead of
9 pursuing law enforcement activities or preparing for trial,
10 spend the day driving to the MDC to hand deliver a drive to the
11 defendant personally which is a remedy that I'm not aware of
12 being implemented in any other case and would be sort of an
13 extraordinary step for this defendant that would be out of step
14 with the ordinary practice.

15 THE COURT: We are a month away from trial but if we
16 are a few days away from trial and suddenly the government has
17 a substantial production of material for some reason, 50 pages,
18 a hundred pages, would the government take those steps?

19 MS. MOE: Your Honor, without having a sense of what
20 those materials are, what their sensitivities are, whether it
21 is sort of a relevant matter that we are producing in an
22 abundance of caution or something that is sensitive that is
23 urgent that is hard to troubleshoot that issue in advance but
24 we are mindful of Court's concern and that, even as we approach
25 trial, that the issue of timing is of particular concern and so

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1 would be attentive to that issue in those circumstances but I
2 think it is difficult assess that in a hypothetical.

3 THE COURT: OK. I will wait for the government's
4 letter.

5 Ms. Sternheim.

6 MS. STERNHEIM: One other issue, Judge; it has to do
7 going forward with the production of Ms. Maxwell to the court
8 house.

9 She is woken up at approximately 3:45. She is taken
10 here and this morning she arrived at 5:38. She sits in a
11 cellblock, very cold, she cannot bring any warmer garments.
12 She is not allowed to look at her legal materials. She is
13 given very little food and whatever she is given doesn't even
14 have a utensil for her to use. And, she is shackled. Today
15 she had to get on her hands and knees to climb into the van
16 because her leg shackles would not permit her to step up. This
17 is just not the right thing. The wear and tear on her going
18 forward to trial five days a week --

19 THE COURT: What is the application, Ms. Sternheim?

20 MS. STERNHEIM: The application is for her to be
21 brought here later. The real application, obviously, is for
22 her to be let out on bail but I'm not going to make that
23 application right here, I will make it in writing, but these
24 conditions are just terrible. And today, when she was nodding
25 out, she was poked to be woken up just because she's the only

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1 person sitting in a cell. That's not necessary.

2 Nutrition is important, sleep is important. We all
3 are going to be fatigued but we all get to go home, and
4 something needs to be done to ensure that she is not
5 debilitated during the trial.

6 THE COURT: Are you making any allegations of
7 differential treatment as to Ms. Maxwell?

8 MS. STERNHEIM: Yes. I don't know any other client I
9 have ever had who has been woken up every 15 minutes at night
10 and then --

11 THE COURT: No, I'm talking about what you are talking
12 about which is the transport to the court house for
13 proceedings.

14 MS. STERNHEIM: I don't know any clients who have ever
15 arrived that early. I can't speak to that. They've never been
16 taken individually as she has so I don't have a big history
17 about that. In other cases that I have had in this court house
18 either the clients come from the MCC, which is no longer here
19 and they're transported one way, or when I come here in the
20 morning for a court proceeding or trial, and I will get here at
21 9:00, I'm told they haven't arrived yet. So, the differential
22 between getting here at 5:38 and not being here at 9:00 for
23 another defendant seems extraordinary.

24 THE COURT: Ms. Moe?

25 MS. MOE: Your Honor, the government is learning of

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1 this concern for the first time at this conference. I would be
2 happy to reach out to both the MDC and the Deputy U.S. Marshal
3 assigned to this particular trial to ask, as a general matter,
4 what time they anticipate producing the defendant on trial days
5 and can provide the defense with that information.

6 THE COURT: Yes; and whether there is any differential
7 treatment between Ms. Maxwell and other defendants being
8 produced from the MDC to the court house under COVID protocols
9 and currently. You will inquire as to that.

10 MS. MOE: Yes, your Honor.

11 THE COURT: As well as differential or not, what the
12 timing issue is, availability of food and comfort items, as
13 necessary, and the like.

14 MS. MOE: Certainly, your Honor.

15 THE COURT: Ms. Sternheim, anything further?

16 MS. STERNHEIM: Thank you, Judge. No.

17 THE COURT: Anything, Ms. Moe?

18 MS. MOE: No, your Honor. Thank you.

19 THE COURT: We are adjourned.

20 ooo